

Europe of the self-employed:

Self-employed between economic freedom and social constraints

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Table of contents

- I. FROM THE SINGLE MARKET TO THE COORDINATION OF SOCIAL SECURITY SCHEMES: WHICH LEEWAY FOR MEMBER STATES TO COMBAT FRAUD FROM SELF-EMPLOYED PERSONS?
 - 1. Introduction
 - 1.1 Self-employed persons: a diversity of market actors
 - 1.2 Self-employed persons: a diversity of EU legal qualification
 - 1.2.1 Self-employed persons may not be workers
 - 1.2.2 Self-employed persons are “Union citizens”
 - 1.3 Leverage for national anti-fraud policies
 - 2. The internal market as a motor for the mobility of the self-employed persons
 - 2.1 Freedom of establishment
 - 2.1.1 Scope of the principle of the freedom of establishment versus free movement of services
 - 2.1.2 Implementation
 - 2.1.3 Freedom of establishment and frauds
 - 2.2 Free movement of services
 - 2.2.1 Broad scope of the “country of origin” principle
 - 2.2.2 Actions which can be undertaken by the host State: specific exceptions to the “country of origin principle” and cases of fraud
 - 2.3 Recognition of professional qualification
- II. THE COORDINATION OF SOCIAL SECURITY SCHEMES : AN EFFICIENT TOOL TO FACILITATE THE MOBILITY OF THE SELF-EMPLOYED PERSONS
 - 1. Introduction
 - 2. General principles
 - 2.1 Equality of treatment
 - 2.1.1 Main principles
 - 2.1.2 Concept of discrimination
 - 2.2 Waiving of residence clauses
 - 2.2.1 Principle
 - 2.2.2 Implementation
 - 2.3 Maintenance of rights in the course of acquisition
 - 2.3.1 Aggregation of periods
 - 2.3.2 Equal treatment of benefits, income, facts or events
 - 2.4 Applicable legislation: conflict rules
 - 2.4.1 General rule and principles
 - 2.4.2 Qualification as self-employed for the conflict rules
 - 2.4.3 The legal framework of posting among self-employed persons
 - 2.4.4 Some other conflict rules
- III. The STATUS AS SELF-EMPLOYED PERSON: ATTRACTION FOR SOCIAL DUMPING?
 - 1. An increase in the number of self-employed
 - 2. Self-employment in a triangle relation
 - 3. Reclassification of self-employed: demarcation between employees and self-employed
 - 3.1. Self-employed or bogus-self-employed?
 - 3.2 Some practical examples

I. FROM THE SINGLE MARKET TO THE COORDINATION OF SOCIAL SECURITY SCHEMES: WHICH LEEWAY FOR MEMBER STATES TO COMBAT FRAUD FROM SELF-EMPLOYED PERSONS?

1. Introduction

In order to achieve the single market, the Treaties sustain all forms of economic exchanges within the Member States: the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured (TFEU, Art.26(2)). Even if they are not expressly mentioned, self-employed workers, whatever form of activity they exercise, take full advantage of the construction of the internal. Indeed, they are concerned by free movement of persons, free movement of services and the right of establishment. Their status is however made very complex by the diversity of their situations: among self-employed persons, there is a diversity of market actors (1.1), a diversity of EU legal qualification (1.2). This diversity has an impact on the leverages for national anti-fraud policies (1.3).

1.1 *Self-employed persons: a diversity of market actors*

The diversity of Treaty rules potentially dealing with self-employment is combined with another form of diversity: self-employment can concern various fields of activity (medical, legal, technical, consulting, etc.). In fact, the entire scope of professional activities (or almost all of them), even those related to public services or States fundamental interests, can be undertaken by self-employed persons. Therefore, it is a mere generalisation to refer to the generic concept of self-employment when each type of activity refers to specific problems requiring fitted legal solutions. For instance, especially when it comes to combat fraud, commercial self-employed activities should not be compared with self-employed activities carried out in the area of public health, social security, public services or State security. These examples also show that many other fundamental principles derived from the Treaties interact with self-employment. This is the case of rules which coordinate social security schemes, which is one of the topics of this report. One of the underlying questions is to determine how to combine the Treaty principles which interaction may even lead, in specific circumstances, to contradictory solutions. This question is crucial when it comes to reflect about the area of fraud (what is a fraudulent behavior? What is not?) and the reactions which can be envisaged.

The classification of self-employed activities indicates that some of them can be exercised without any specific requirements whereas some others demand the possession of a title, a degree, a professional experience or specific skills which are subject to prior assessment, an authorization or an administrative declaration. This classification based on the accessibility of self-employed activities implies to discuss the matter of mutual recognition of skills and competences which, as we will see further in the report (see 2.2.3), has been primarily thought as a matter related to self-employed persons. Again, actions against fraud will have to take into consideration the EU rules concerning accessibility of activities, which are connected to the fundamental principles of right to establishment and free movement of services.

Self-employment can also take several shapes when it comes to the definition of the form of the activities. They can be physical or intellectual; they may also be virtual or entail physical contacts with the recipient. For instance, a doctor exercising as a self-employed person may visit his patients or do “on-line” consultations; he may alternately decide to relocate his permanent activity in any other Member State of the European Union (EU). These forms of activity are likely to be subject (and protected/encouraged) by the Treaty when they have an actual or a potential impact on the internal market. The risks of fraud must be assessed in the light of the application of the Treaty principles.

This latter remark leads to another element of complexity for the understanding of the status of self-employed workers: according to Article 4(2) TFEU, the internal market is indeed among the area of shared competence between the Union and the Member States. It means that the status of self-employment is not exclusively addressed by EU legislation (except when it is connected to competition rules: see Article 3(2) TFEU) since Member States remain partly competent. This is why the definition of a “self-employed person” is purely national¹ and that the statuses of self-employed activities are in principle regulated by domestic rules. However, national regulations must be compatible with EU requirements. Combating fraud from self-employed persons cannot be, therefore, an isolated national matter.

1.2 Self-employed persons: a diversity of EU legal qualification

If the EU classification of self-employed persons as service providers (see 2.1) or as professionals exercising their right to establishment (see 2.2) is traditional, can they also seek protection of rules of free movement of workers and free movement of citizens? According to the classification retained in each case, the status of the self-employed activity will be variable : are they workers? (1.2.1) Are they Union citizens? (1.2.2). The responses will impact the concept of fraud and the choice of methods to combat it.

1.2.1 Self-employed persons may not be workers

When it refers to persons exercising a professional activity, the Treaty uses the global expression of “worker”. Does it cover both employees and self-employed persons or does it target solely the former ones? Article 45 TFEU which declares that “*Freedom of movement for workers shall be secured within the Union*”, could apply to employed as well as to self-employed persons, even if its content is more adapted to the formers. Nevertheless, it was probably the intention the Treaty negotiators to connect freedom of movement of workers to salaried work. The Court of Justice confirms this interpretation: according to settled case-law, the status of worker depends on a link of authority which is a characteristic of employed activities and which departs employed workers and self-employed workers².

However, this interpretation may be challenged since a literal reading of Article 45 TFEU could give way to a broader personal scope. Hence, self-employed workers may benefit from Article 45(2) TFEU which provides that the freedom of movement entails “*the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment*”. Also, self-employed persons could fall within the scope of Article 45(3) TFEU according to which free of movement of workers entails the right “*to accept offers of employment actually made*”, “*to move freely within the territory of Member States for this purpose*”, “*to stay in a Member State for the purpose of employment*” and “*to remain in the territory of a Member State after having been employed in that State*”. In these wording, “employment” could be understood broadly as covering salaried or independent employment. This interpretation of Article 45 TFEU is however difficult to sustain though if one looks at Regulation 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, it refers exclusively to employed workers. Thus, Article 7(2) of Regulation 1612/68 which provides that social and fiscal advantages should be provided without any discrimination on the grounds of nationality, may not applicable to self-employed persons.

¹ See, in this respect, Article 1(b) of Regulation 883/2004.

² Case C-151/04, *Nadin*, [2005]

1.2.2 Self-employed persons are “Union citizens”

The classification of self-employed persons as “workers” may not be a crucial question from a practical point of view. Indeed, self-employed persons are part of the powerful, global and symbolic category of “Union citizen”; they can claim the rights attached to this status. In particular, one core provision of the TFEU provides that *“Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”* (Article 18). It is also on the grounds of their status of “Union citizens” that self-employed persons have *“the right to move and reside freely within the territory of the Member States”* (TFEU, Art. 20).

The right to move is essential for realizing the internal market. It is implemented in a key secondary legislation, Directive 2004/38 EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (for employees: see also Regulation 1612/68). It applies to “all Union citizens” (Article 3), including therefore self-employed persons. The directive gives them fundamental rights, among which:

- the right to leave the territory of a Member State to travel to another Member State, as long as they hold a valid identity card or passport;
- the right to enter the territory of all Member State with a valid identity card or passport;
- the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities. This right of residence for a short stay is decisive for self-employed persons who wish to go to another Member State in order to provide a service for a short period of time;
- the right of residence on the territory of another Member State for a period of longer than three months if they are workers or self-employed persons in the host Member State.

Explicitly referred to at this stage by the directive, self-employed persons enjoy the right to stay, without any further conditions to fulfill (such as a minimum level of income or a social security coverage), for a long term stay. This right may cover a temporary stay or a permanent stay. In both cases, self-employed persons’ right to move is protected by the Directive. The level of protection is so high that in some circumstances (i.e if he/she is temporarily unable to work as the result of an illness or accident), a Union citizen who is no longer a self-employed person retains this status. In order to stay in the host Member State, a residence permit cannot be required. Instead, they may be required to produce a registration certificate which is issued with the presentation of a valid identity card or passport and a proof that they exercise a self-employed activity. An expulsion measure may in no case be adopted against Union citizens or their family members if they are self-employed persons.

Article 24 of Directive 2004/38 complements the right to reside with the right of equality of treatment: *“all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right are extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence”*. This provision, which is a transposition into the “residence Directive” of the most fundamental principle of the TFEU contained in Article 18, may raise some problems of interpretation, especially the definition of “the scope of the Treaty” and the definition of the residence “on the basis of the directive”.

Does Article 24(1) of the Directive have the same scope as Article 7(2) of Regulation 1612/68 which applies to employees? It is difficult to come up with a definite answer; however it must be noted that by way of derogation to Article 24(1), the host Member State is not obliged *“to confer entitlement to social assistance during the first three months of residence”* (Article 24(2)). This specific restriction, if

combined with the broad interpretation that the Court of Justice retains of the concept of “social advantages”, which includes the granting of rights to former workers and even to workers who do not reside in the working State or the acquisition of advantages which are not connected to the professional activity but to the everyday life³, may allow to conclude that the principle of non discrimination based on nationality has a narrower scope under Directive 2004/38 than under Regulation 1612/68. Therefore, self-employed persons would receive a less favourable treatment than employees. Such a conclusion could however prove to be wrong, not only because the interpretation of Article 24 of the Directive is still uncertain, but also because self-employed persons could refer directly to Article 18 TFEU in order to claim the rights as nationals. They may also, depending on their status, seek protection of the Treaty rules on free movement of services or on right to establishment (see 2.1.2).

Even if there are doubts about the scope of the principle of non discrimination when it is applied to self-employed workers, their right to move across borders protected by Directive 2004/38 is necessary to allow them to exercise their activity within the EU space. Without such rights, they could not take advantage of their right to establishment; their right to provide services would also be affected. When building an anti-fraud policy, a Member State must take into account the fundamental rights of free movement across borders and non discrimination based on nationality which self-employed persons fully benefit from.

1.3 *Leverage for national anti-fraud policies*

In the framework of the EU Treaties and even if the category of “self-employed activities” is very broad and covers multiple forms of activities, self-employed persons are economic actors and, as such, they contribute to the realization of the single market. Despite the fact that the interaction between EU law main provisions is highly complex and, in some cases, uncertain, they ensure that self-employed persons are put in the best conditions to carry out their activity anywhere in the EU area.

This core objective must be born in mind when it comes to consider the risks of fraud which self-employed workers might be responsible for and, consequently, the actions which Member States can undertake to combat them. In this respect, the concept of fraud must be well understood. It must not clash with the objective of fair competition, such as defined by EU standards, between self-employed persons established in Member States or providing cross-border services within the EU. In other words, what national legislations could consider justified reactions of protection of their domestic market could be seen by the Commission and the Court of Justice as contradictory to the internal market. Furthermore, frauds, if duly proven, must be fought with methods which are compatible with EU principles and rules safeguarding the right to self-employed persons to exercise their activities throughout Europe.

Since EU law acts as a motor for cross-border self-employment activities either through economic freedoms (2.) or, within the area of social security, the general principles of coordination set by Regulation 883/2004 (3.), there is not much leverage for national fraud policies.

³ For instance, entitlement to « a large family” train card (see Case 32/75 *Cristini* [1975] or to a funeral allowance (Case C-237/94, *O’Flynn* [1996]).

2. The internal market as a motor for the mobility of the self-employed persons

Freedom of establishment (2.1) and free movement of services (2.2) protect the right of self-employed workers to exercise their activities throughout the EU. Rules ensuring the mutual recognition of qualifications (2.3) come as a consequence as these two fundamental freedoms.

2.1 Freedom of establishment

According to Article 49 TFEU, *“restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State”*. Freedom of establishment includes the right to take up and pursue activities as self-employed persons. It is useful to look more closely at the scope (2.1.1) and the implementation (2.1.2) of the principle of freedom of establishment in order to evaluate the risks for fraud and the remedies (2.1.3).

2.1.1 Scope of the principle of the freedom of establishment versus free movement of services

Drawing a difference between the free movement of services and the free movement of establishment is not an easy task. We can only speak of the free movement of services if the rules regarding the free movement of goods, capital or persons do not apply. Thus, the Court stated that from Art. 60, para. 3 (now Art. 57) of the Treaty it appears that the rules regarding the free provision of services, at least if the service-provider goes to another member-State, concern a situation in which the latter goes from one member-State to another, not to establish himself there, but to undertake work there temporarily. The temporary nature of the service-provision must be assessed according to the duration, frequency, periodicity and continuity of the service. This does not preclude a service-provider within the meaning of the Treaty providing for an infrastructure in the host country (including an office or consulting rooms), if that infrastructure is necessary for providing the service in question.⁴ Making a distinction between temporary (the free movement of services) and permanent (the free movement of establishment) is therefore a very delicate exercise as it the result of a combination of criteria, depends to a big extent from the factual situation and which can as such never be systematically and precisely defined.

Work which is done continually, or at least whose end cannot be predicted, cannot come within the scope of the Community provisions on service-provision. However, it might well, depending on the case, come within the scope of Articles 48 to 51 inclusive (now 39-42, free movement of workers) and 52 to 58 inclusive (now 43-48, free movement of establishment) of the Treaty.

The rules for the free movement of services thus do not apply to a case in which the national of one member-State goes to another member-State and establishes his main place of residence there, for the purpose of providing or receiving services there for a period of unspecified duration.⁵ Distilling the jurisprudence of the ECJ meanwhile, we can highlight the following features of the free movement of services: it must be a matter of services that are provided in a member-State other than that where the service-provider is established (the so-called transnational character); a fee must be paid in return for the provision of services; the service-provision is of a temporary nature; the services include work of an industrial nature, commercial nature, handicrafts or the liberal professions.

⁴ Case C-55/94, *Gebhardt* [1995].

⁵ Case C-196/87, *Steymann* [1988] ECR, 6159.

The essence of freedom of establishment is the actual pursuit of an economic activity throughout a fixed establishment in another Member State for an indefinite period. This implies as well the right to take up an activity as the right to pursue an activity under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

The Court of Justice ruled that the principle of equal treatment with nationals is one of the fundamental legal provisions of the community⁶. The concept of establishment in the meaning of the Treaty is therefore a broad one, allowing a Union citizen to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit there from, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons⁷.

The starting point of the free movement of services is however different. Where under the freedom of establishment (like under the free movement of workers) the individual leaves state A to work in state B, it is to the latter state B to control the activities of the individual. Under the free movement of services however the service provider remains based in State A while providing services in State B, and where now the principal regulator remains the home state A. Thus the ECJ stated very clearly that a member-State may not make the provision of services in its territory dependent on adherence to all the conditions that apply to establishment, because that would deprive the treaty provisions designed to ensure the free provision of services of any useful effect.⁸ This situation would be quite different if the free movement of services were to slip into free movement of workers or establishment. After all, the last two freedoms usually aim at integration in the new country. The applicable law in such circumstances differs fundamentally according to the applicable freedom. It is therefore extremely important to decide whether we are in a situation of the free movement of workers, service-provision or establishment.

The ECJ stated that according to Articles 59 and 60 para. 3 of the EC Treaty, now 56 and 57 TFEU a person who provides services may undertake work to that end temporarily in the country where the service will be provided, under the same conditions which that country imposes on its own nationals. Here, it is a matter of the rules regarding access to the territory of the country where the service is provided and therefore not of equal treatment with, for example, the employment conditions in the host country.⁹ Fully equal treatment as regards working conditions must even be considered as a negation of the free movement of services.

Freedom of establishment rules are activated only if there are cross-border elements. For instance, it does not apply to a purely internal situation in Belgium in which a Belgian national engages within its territory in a self-employed activity in respect of which he cannot rely on any previous training acquired in another Member State¹⁰. Nevertheless, a national of a Member State is entitled to claim the application of rules of the freedom of establishment against his own Member State if his situation is not purely internal which will be the case, for instance, if he has been awarded a degree in another Member State.

⁶ Case 2/74, *Reyners* [1974]

⁷ Case C-55/94, *Gebhard* [1995]

⁸ Case C-76/90, *Säger* [1991], confirmed by a.o. Case C-205/84, *Commission v. Germany* [1986] or Case C-154/89, *Commission v. France* [1991].

⁹ These provisions entail the abolition of all discrimination against a person providing a service on the grounds of his nationality or the fact that he is established in a member state other than that in which the service must be provided. Thus they prohibit not only overt discrimination based on the nationality of the person providing the service but also all forms of covert discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result. (Case 62/81 and 63/81 *Seco* [1982])

¹⁰ Case C-152/94 *Openbaar Ministerie* [1995]

Freedom of establishment rules apply only to nationals of Member States and their family members, even if they are not Union citizens. It means that other persons, even if they can prove elements of extraneity within the EU, are not subject to this principle. For instance, a Brazilian who graduated in Portugal and who wants to set a permanent activity in Spain cannot rely on the principle of freedom of establishment to do so. This exception needs to be considered when considering an anti-fraud policy. However, there is an exception provided by Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents: a long-term resident may reside in a second Member State for a period exceeding three months in order to exercise of an economic activity in an employed or self-employed capacity.

2.1.2 Implementation

The freedom of establishment implies that any obstacles to self-employed activities must be removed. Prohibited obstacles include those which are not directly connected to the pursuit of the professional activity, such as rules to acquire a property¹¹ or tax rules and any other fiscal advantages. Any measure which, pursuant to any provision laid down by law, Regulation or administrative action in a Member State, or as the result of the application of such a provision, or of administrative practices, hinders nationals of other Member States in their pursuit of an activity as a self-employed person by treating nationals of other Member States differently from nationals of the country concerned, is prohibited¹². We will see further on that access without discrimination on the grounds of nationality to social security advantages is a way to implement the freedom of establishment (see 3.1).

Directive 2006/123/EC of 12 December 2006 on services in the internal market increases the protection provided to self-employed persons who wish to set a permanent activity in a Member State. The substance of the Directive helps understand the narrow leeway which Member States have to combat fraud when it comes to Union citizens intending to set a permanent activity in a Member State. In particular, national rules of prior authorization are very strictly controlled. In principle, Member States must not make access to a service activity or the exercise thereof subject to an authorisation scheme, unless the authorisation scheme does not discriminate against the provider in question, the need for an authorisation scheme is justified by an overriding reason relating to the public interest and the objective pursued cannot be attained by means of a less restrictive measure. If they apply, authorisation schemes must be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary manner. Furthermore, the conditions for granting authorisation for a new establishment must not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to which the provider is already subject in another Member State. The authorisation must enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, including by means of setting up agencies, subsidiaries, branches or offices. Other guarantees apply as regards the granting procedures and the duration of the authorization granted.

The directive insists on other prohibited requirements which reduce the leeway for anti-fraud measures. Indeed, Member States must not make access to, or the exercise of, a service activity in their territory subject to compliance with discriminatory requirements based directly or indirectly on nationality or, in the case of companies, the location of the registered office. Member States must examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements: (a) quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum

¹¹ Case C-302/97, *Konle* [1999]

¹² (Case C-11/91, *Com. v. Luxembourg* [1993])

geographical distance between providers; (b) an obligation on a provider to take a specific legal form; (c) requirements which relate to the shareholding of a company; (d) requirements which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity; (e) a ban on having more than one establishment in the territory of the same State; (f) requirements fixing a minimum number of employees; (g) fixed minimum and/or maximum tariffs with which the provider must comply; (h) an obligation on the provider to supply other specific services jointly with his service.

2.1.3 Freedom of establishment and frauds

Even if the right to establishment is a fundamental principle of the EU which must be respected by national legislation, the Court of justice admits that there might be cases of fraud Member States can combat.

Hence, *“a Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state; such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services”*¹³. For instance, the Court ruled that *“by prohibiting national broadcasting organizations from helping to set up commercial radio and television companies abroad for the purpose of providing services there directed towards the Netherlands, the Netherlands legislation at issue has the specific effect, with a view to safeguarding the exercise of the freedoms guaranteed by the Treaty, of ensuring that those organizations cannot improperly evade the obligations deriving from the national legislation concerning the pluralistic and non-commercial content of programmes”*¹⁴.

It derives from this case-law that fraud is related to cases in which a self-employed person would try “improperly” to evade the obligations of a national legislation. For the Court of Justice, improper attitudes refer to artificial arrangements: in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must indeed be *“to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory”*¹⁵. It means that, on the contrary, the fact that a Union citizen, for instance a self-employed person, *“sought to profit from tax advantages in force in a Member State other than his State of residence cannot in itself deprive him of the right to rely on the provisions of the Treaty”*¹⁶.

2.2 Free movement of services

This is surely the area where Member States believe that the chances of fraud are high. Indeed, if the right to permanent establishment of Union citizens in any Member States in view of exercising a self-employed activity is easy to defines, the right for a self-employed person to provide temporary services in a Member State other the State of establishment raises specific problems because of the resulting short-term (the time necessary for the provision of the service) interaction it creates between two national legislations.

¹³ Case 3/74, *Van Bisschop* [1974]

¹⁴ Case C-149/91, *Vereniging Veronica Omroep Organisatie* [1993]

¹⁵ Case C-196/04, *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd* [1996]

¹⁶ Case C-364/01 *Barbier* [2003]

EU legal instruments as well as the case-law of the Court of Justice show that it is only by way of derogation that the host Member State can apply part of its legislation to service providers. The “country of origin” principle has a very broad scope (2.2.1). It is in this context that the existence and the fight against cases of fraud must be assessed (2.2.2).

2.2.1 Broad scope of the “country of origin” principle

Despite Article 57 TFEU which states that *“the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals”*, the Court of Justice denied the right for Member States to apply their whole legislation to self-employed persons providing services on their territory since that person is already subject to rules in the Member State where he is established¹⁷. The Court of Justice sticks to its case-law following which *“the freedom to provide services is one of the fundamental principles of the treaty and may be restricted only by provisions which are justified by the general good and which are imposed on all persons or undertakings operating in the said state in so far as that interest is not safeguarded by the provisions to which the provider of the service is subject in the member state of his establishment”*¹⁸.

When determining the elements of its legislation a Member State hosting the service is entitled (or not) to apply to a service provider¹⁹, the Court of Justice refers not only to the principle of non discrimination on the grounds of nationality, but also to the prohibition of any other obstacles hindering free movement of services irrespective of the nationality: *“Article 59 of the Treaty (56 TFEU) requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services”*²⁰. According to settled case-law, it is only when national measures hindering the freedom of movement of services are not discriminatory (on the grounds of nationality), are objectively justifiable by an overriding reason relating to the general interest, suitable for attaining the objective pursued and satisfy the principle of proportionality that they are compatible with the Treaty.

Article 16(1) of Directive 2006/123 incorporates these guidelines. The principle is that a Member State in which the service is provided must ensure free access to and free exercise of a service activity within its territory. Member States must not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the general principles of non-discrimination (the requirement may be neither directly nor indirectly discriminatory with regard to nationality), of necessity (the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment), of proportionality (the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective). If a Member State reacts against a situation which it considers as abusive by requiring the application of its own legislation to a service provider, it must ensure the compliance with the principles of Article 16(1).

¹⁷ Case 110 and 111/78, *Van Wesemael* [1979]

¹⁸ Case 279/80, *Webb*, [1981]

¹⁹ Directive 2006/123 also requires that Member States do not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State. For example, an obligation to obtain authorisation from or to make a declaration to their competent authorities is prohibited.

²⁰ Case C-76/90, *Säger and Dennemeyer* [1991]

More specifically, in order to avoid the application of the legislation of the host Member State, Member States must not impose an obligation on the provider to have an establishment in their territory, an obligation to obtain an authorization from their competent authorities (including entry in a register or registration with a professional body or association in their territory), the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed, an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity, or requirements (except for those necessary for health and safety at work) which affect the use of equipment and material which are an integral part of the service provided (Article 16(2) of the Directive). This list is inspired by the case-law of the Court of Justice. The number of cases where the application of the legislation of the host Member State to service providers has been ruled as contradictory to the free movement of services is impressive. For instance, the obligations to require linguistic skills, to require an administrative authorisation to work from the service provider, to require a declaration or a registration from the recipient, to require a deposit, to have an office in the host State, etc. which were imposed to the service provider by the host Member State have been ruled as incompatible with the free movement of services. In any event, economic aims cannot constitute grounds of public policy²¹.

2.2.2 Actions which can be undertaken by the host State: specific exceptions to the “country of origin principle” and cases of fraud

If the so-called “Bolkestein” proposition for directive on services had been adopted (Com (2004) 2 final), the “country of origin principle” would have received an even broader scope than under the case-law of the Court of Justice: a service provider would have had to comply only with the administrative and legal requirements of his country of establishment. The Directive which was finally adopted (Directive 2006/123) leaves room for the application of the legislation of the host State, though cases where it is applicable remain narrow.

If we leave aside the fact that the freedom of movement of services only covers providers and recipients²² who are Union citizens (See Article 4 of Directive 2006/123, Case C-290/04, *FKP Scorpio* [2006]), there are other legal grounds (together with possibilities open by Article 16(1) of Directive 2006/123²³) for the application of the host legislation:

- Several sectoral activities are excluded from the scope of the Directive by its Article 17. This is the case, for instance, of services of general economic interest such as the postal sector, the electricity sector, the gas sector or the water distribution. The exclusion concerns also the matter of cross-border posting of workers²⁴ and cross-border social security coordination²⁵. In these sectors, specific rules are applicable through *ad hoc* Directives. These exclusions are to be combined with Article 2 of the Directive which defines its scope and which excludes a long list of activities from the *rationae materiae* scope of the Directive. For instance, it does not cover services of temporary work agencies, healthcare services whether or not they are provided via healthcare facilities, social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State. However, these exclusions do mean that, on these matters, Member States are free to impose their own legislation on service providers acting on their territory. National legislations must indeed comply with the Treaty provisions on free movement of

²¹ Case 352/85, *Bond van Adverteerders*, [1988]

²² Derogations exist for recipients: see, for instance, the area of social security coordination.

²³ See 2.2.1.

²⁴ See Directive 96/71.

²⁵ Which remain subject to Regulation 883/2004.

services (which have inspired Directive 2006/123). If we take the example of the application of Directive 96/71 concerning posting of workers, the Court of Justice keeps on ruling, despite the entry into force of the Directive, on the grounds of the Treaty or, at least, interprets the Directive in the light of the Treaty provisions²⁶;

- According to Article 16(3) of Directive 2006/123, the Member State to which the provider moves must not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment;
- Article 18 of the Directive provides that “*in exceptional circumstances only*”, a Member State may, in respect of a provider established in another Member State, take measures relating to the safety of services. This exception is made conditional upon the compliance with some requirements: the national provisions in accordance with which the measure is taken have not been subject to Community harmonization in the field of the safety of services; the measures provide for a higher level of protection of the recipient than would be the case in a measure taken by the Member State of establishment in accordance with its national provisions; the Member State of establishment has not taken any measures or has taken measures which are insufficient; the measures are proportionate.

None the less, it seems that this set of derogations provided by the Directive may not all be ruled by the Court of Justice compatible with the Treaty. In other words, the leeway left to host Member States might be slimmer than it seems.

Even if exceptions to the principle of free movement of services must be interpreted strictly and according to the Treaty principles, the Court of Justice allows them when all conditions are met. For instance, in the area of public health, a system of prior authorization for reimbursement of cross-border hospital costs has been considered to be justified²⁷. Concerning situations of fraud, it appears that it is mainly where a self-employed person would, in fact, not be providing a temporary service but exercising a permanent activity in the other Member State that this concept could be invoked in order to apply the host legislation²⁸. For instance, an activity exercised in another Member State “*without a foreseeable limit to its duration does not fall within the Community provisions concerning the provision of services*”²⁹, but services within the meaning of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even over several years, where, for example, the services in question are supplied in connection with the construction of a large building!³⁰ In any event, it is not permissible for a Member State “*to prohibit altogether the provision of certain services by operators established in other Member States, as that would be tantamount to abolishing the freedom to provide services*”³¹. Only specific measures can be taken. Also, a service can remain temporary even if it requires, in the host Member State, the existence of an infrastructure as long as this infrastructure is necessary for the provision of the service.

2.3 Recognition of professional qualification

Member States may fear that cases of fraud come from self-employed persons who provide services on their territory without having the necessary professional qualifications. Not only the lack of

²⁶ see, for instance, Case C-165/98, *Mazzoleni* [2001]

²⁷ Case C-157/99, *Smits and Peerbooms* [2001]

²⁸ see case *Van Binsbergen*, *op. cit.*

²⁹ Case 196/97, *Steymann* [1988]

³⁰ Case C-215/01, *Schnitzer* [2003]

³¹ Case C-211/91, *Commission v. Belgium* [1992]

qualification may create situations of unfair competition but it may also be the cause of risks related to the insufficient quality of the service rendered.

However, Member States are not free to develop their own policy as regards the qualification which they are entitled to require from self-employed persons trained in other Member States. Indeed, an EU approach is necessary in this area in order to favour the realisation of the internal market and to ensure the *effet utile* of the prohibition of discrimination on the grounds of nationality and of the right to move freely within the EU by setting up a system of recognition of qualification. The foundations of this system is set out in Article 53 TFEU which provides that, in order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council can issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.

This had lead to the adoption of several directives and, finally, to Directive 2005/36/EC of 7 September 2005 on the recognition of professional qualifications that facilitates for nationals of the Member States the right to pursue a profession, in a self-employed capacity, in a Member State other than the one in which they have obtained their professional qualifications. By merging former directives on a general system of recognition and on sectoral professions, this directive sets a system of recognition of qualification for self-employed persons setting their permanent activity in a Member State other than the ones where the qualification has been obtained. Like its predecessors, Directive 2005/36/EC provides for a partial coordination of some requirements for taking up professional activities in another State as well as for a conflict rule with regard to the rules governing the pursuit of these activities. It also incorporates thorough rules of recognition applicable to service providers which, before, were provided only by sectoral directives. We will concentrate on these latter rules which are set by Article 5 to 9 of the directive. If we look at their content, it is obvious that the goal of the Directive is to simplify the access to the territory of Member States for service providers. Consequently, it minimizes the substantial and administrative requirements from cross-border service providers.

The principle is indeed that Member States must not restrict, for any reason relating to professional qualifications, the free provision of services in another Member State. Article 5(1) establishes the principle that EU/EEA nationals who are legally established in a Member State for the purpose of pursuing a profession may exercise that profession in another Member State on a temporary and occasional basis, without having to apply for recognition of their qualifications. However, this freedom of professional movement is subject to two conditions : 1° the service provider must be legally established in a Member State for the purpose of pursuing the same profession there, 2° he must have pursued that profession in the Member State of establishment for at least two years during the 10 years preceding the provision of services when the profession is not regulated in that Member State (the condition requiring two years' pursuit does not apply when either the profession or the education and training leading to the profession is regulated). If the two conditions are not met, it does not mean that the State where the service is provided is free to subject the self-employed person to its entire legislation: requirements must remain compatible with the Treaty principles protecting the free movement of services. It must also, in our view, respect the conditions set by Directive 2006/123 (see 2.2.1 and 2.2.2)³².

When both conditions are met, no system of prior authorization is permitted. The host Member State exempts service providers established in another Member State from the requirements which

³² We may even wonder how, in general, Directive 2006/123 and 2005/36 combine. See Article 17,6) of Directive 2006/123.

it places on professionals established in its territory relating to authorisation by, registration with or membership of a professional organisation or body. No registration with a public social security body for the purpose of settling accounts with an insurer relating to activities pursued for the benefit of insured persons can be required either.

The service is provided under the professional title of the Member State of establishment, in so far as such a title exists in that Member State for the professional activity in question. This is therefore a system of automatic recognition which the Directive applies to service providers. That title is indicated in the official language or one of the official languages of the Member State of establishment in such a way as to avoid any confusion with the professional title of the host Member State. Where no such professional title exists in the Member State of establishment, the service provider indicates his formal qualification in the official language or one of the official languages of that Member State.

Instead of a system of authorization, which would have been contrary to the freedom of services, the Directive sets up a system of prior declaration. Member States may indeed require that, where the service provider first moves from one Member State to another in order to provide services, he must inform the competent authority in the host Member State in a written declaration to be made in advance including the details of any insurance cover or other means of personal or collective protection with regard to professional liability. Such declaration must be renewed no more frequently than once a year if the service provider intends to provide temporary or occasional services in that Member State during that year. The service provider may supply the declaration by any means.

However, the Directive is aware of the risks encountered by an over simplified system of recognition of qualification which may facilitate fraudulent prior declarations. In this respect, the Directive sets limits by allowing to some extent the application to service providers of the legislation of the Member State of establishment. For some professions (but only for them), the host Member State is entitled to verify the qualifications of the service provider: in the case of regulated professions having public health or safety implications which do not benefit from automatic recognition, the competent authority of the host Member State may check the professional qualifications of the service provider prior to the first provision of services. However, such a prior check is possible only where the purpose of the check is to avoid serious damage to the health or safety of the service recipient due to a lack of professional qualification of the service provider and where this does not go beyond what is necessary for that purpose.

Another way of controlling the reliability of the prior declaration is the right, for the first provision of services or if there is a material change in the situation substantiated by the documents, to require that the declaration be accompanied by some documents such as the proof of the nationality of the service provider; an attestation certifying that the holder is legally established in a Member State for the purpose of pursuing the activities concerned and that he is not prohibited from practising, even temporarily, at the moment of delivering the attestation; the evidence of professional qualifications, etc.

It is in the same spirit of protecting the host State that the service provider is subject in this State to rules of a professional, statutory or administrative nature which are directly linked to professional qualifications, such as the definition of the profession, the use of titles and serious professional malpractice which is directly and specifically linked to consumer protection and safety, as well as disciplinary provisions which are applicable in the host Member State to professionals who pursue the same profession in that Member State. In order to facilitate the application of disciplinary provisions in force on their territory, Member States can provide either for automatic temporary registration with or for pro forma membership of such a professional organisation or body, provided

that such registration or membership does not delay or complicate in any way the provision of services and does not entail any additional costs for the service provider. Article 5(3) seems to establish a model of host State control in respect of regulation governing the exercise of professional activities. As is apparent from recital 11, the notion of “professional rules” is to be interpreted in the light of the ECJ’s ruling in *Van Binsbergen*. Broader than “disciplinary provisions”, the notion covers, inter alia, rules relating to organisation of the profession, professional standards, including those concerning ethics, supervision and liability³³.

In order to reduce the risks of confusion for the service recipients, in cases where the service is provided under the professional title of the Member State of establishment or under the formal qualification of the service provider, the competent authorities of the host Member State may require the service provider to furnish the recipient of the service with some information listed in Article 9 of the Directive, such as his commercial registration number the name and address of the competent supervisory authority if the activity is subject to authorisation in the Member State of establishment, etc.

Does the system of mutual recognition of qualification applicable to service providers allow fraud? In our view, one of the sources of fraud might derive from the confusion between the status of service provider and the status of a self-employed person permanently established in a Member State and, therefore, subject to stricter rules concerning the recognition of qualification. Indeed, one of the weaknesses of Directive 2005/36 lies in the unclear definition of a “service provider”. According to Article 5(2), it applies where the service provider moves to the territory of the host Member State to pursue an activity “*on a temporary and occasional basis*”. The temporary and occasional nature of the provision of services is “*assessed case by case, in particular in relation to its duration, its frequency, its regularity and its continuity*”. Such a definition which is the codification of the case-law of the ECJ³⁴, leaves room for interpretation...and for self-employed persons to try to take advantage of EU simplified rules applicable to temporary service provisions. In this respect, Article 8 of the Directive is another instrument to combat fraud: it provides that the competent authorities of the host Member State may ask the competent authorities of the Member State of establishment, for each provision of services, to provide any information relevant to the legality of the service provider's establishment and his good conduct, as well as the absence of any disciplinary or criminal sanctions of a professional nature.

The fact that the provisions of Directive 2005/36 on free movement of services only apply where the service provider moves to the territory of the host Member State means that such rules do not cover situations where the service is “virtual”. This would be the case, for instance, of a lawyer doing cross-border consulting by mail, phone or internet. Risks of services rendered by a provider who does not have a sufficient qualification are therefore significant. Fraud cases can be combated... as long as the principle of free movement of services protected by the Treaty and by Directive 2006/123 is respected.

³³ Cf. Case 33/74 (*Van Binsbergen*), at 12.

³⁴ Case C-55/94, *Gebhard* [1995]

II. THE COORDINATION OF SOCIAL SECURITY SCHEMES : AN EFFICIENT TOOL TO FACILITATE THE MOBILITY OF THE SELF-EMPLOYED PERSONS

1. Introduction

In 1958, the first coordination regulations were covering employees only. Regulation 1408/71 also applied, initially, to persons working under a labour contract. It does not mean that in the area of social security, migrant self-employed were deprived from rights. Indeed, they were protected by the Treaty provisions about freedom of establishment and free movement of services. Even now, for benefits or schemes (for example, conventional or private supplementary schemes) which fall out of the scheme of coordination regulations, self-employed persons can still claim the application of the Treaty provisions if they consider that rules are discriminatory on the grounds of nationality or that they hinder their right to move freely between Member States. For instance, the Court of Justice ruled about a Belgian lawyer practising his activities in Germany and in Belgium that Article 52 TFEU (freedom of establishment) *“precludes a Member State from requiring contributions to be made to the social security scheme for self-employed persons by persons already working as self-employed persons in another Member State where they have their habitual residence and are affiliated to a social security scheme, that obligation affording them no additional social security cover”*³⁵.

Without referring to the Treaty, the Court of Justice tried to extend the coverage of the coordination regulation by a dynamic interpretation, providing that self-employed persons were falling within its scope if they were protected against one or more risks by extension of schemes organized for the benefit of the generality of workers³⁶. Finally, Regulation (EEC) 1390/81 of 12 May 1981 extended to self-employed persons and members of their families the rules of Regulation 1408/71. This was the natural consequence of the fact that freedom of movement for persons, which is one of the cornerstones of the EU, is not confined to employed persons but also extends to self-employed persons in the framework of the freedom of establishment and the freedom to supply services.

The goal of the extension was to subject as much as possible self-employed workers to the same rules of coordination as employees. Regulation 883/2004 confirmed the extension since it applies to *“nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States”*, without referring to a professional activity any longer. If there are still some specific rules for self-employed persons, mainly gathered in the title on applicable legislation (this is where rules about posting of self-employed persons are located³⁷), self-employed persons are subject to the same rules of coordination as employees. In particular, self-employed persons take advantage of the main principles of coordination: equality of treatment (2.1), waiving of residence clauses (2.2) and maintenance of rights in the course of acquisition (2.3).

2. General principles

³⁵ Case C-53/95, *Kemmler* [1996]

³⁶ Case 19/68, *De Cicco* [1968]

³⁷ Although the Coordination Regulations became only at a later stage from 1982 on applicable to self-employed people (Reg.1390/81) and self-employed knew at the beginning some different provisions (like in the field of health care (special provisions when they enjoyed under national law a different coverage than employees) , pensions (aggregation and specific professional schemes) , child benefits (payment according to country of employment) unemployment (only the export provision applied to them)...) today there are, apart from some special conflict rules, no differences anymore between self-employed and employees. See further for an analysis of « self posting » situations under 2.4.

2.1 Equality of treatment

According to Article 4 of Regulation 883/2004, *“unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof”*. The objective is to ensure, in accordance with Article 45 TFEU, equal treatment in matters of social security, without distinction based on nationality, for the persons to whom that regulation applies by abolishing all discrimination in that regard deriving from the national legislation of the Member States³⁸.

2.1.1. Main principles

All EU citizens falling within the scope of Regulation 883/2004 – therefore self-employed persons - are protected by the principle of equality of treatment. This principle is interpreted as broadly as possible in order to ensure the useful effect of rules of coordination and of freedom of movement.

However, its framework of application needs to be carefully designed. Indeed, there are some situations in which this principle is not relevant: where situations are purely internal (without elements of extraneity connecting it to at least two Member States); where the benefit claim is not covered by the material field of the Regulation. In any event, the principle of equal treatment does not affect the right for Member States to determine the conditions of affiliations to their social security schemes or to set the amount of benefits, as long as nationals from other Member States are treated in the same way as nationals from the State providing the benefit or the advantage. Even if, by being mobile and crossing the border of a Member State, a self-employed worker loses social security rights because the new applicable legislation is less favourable than the one he was subject before, the principle of equality of treatment cannot be invoked to challenge this situation. In other words, the inequality of treatment principle does not preserve from negative consequences due to differences between national legislations.

With the extension of coordination rules to third country citizens by Regulation 859/2003³⁹, the principle of equality of treatment now applies to all individuals subject to the coordination rules. The consequences of this extension as regards the principle of equality of treatment must however be clearly defined. Indeed, it does not mean that third country citizens are subject to the principle of non discrimination on the grounds of nationality in all circumstances: it only covers individuals who are legally resident in the territory of a Member State and who are in a situation which is not confined in all respects within a single Member State. For instance, a Brazilian national who is established in Portugal as a self-employed person is covered by coordination rules if he is “posted” to Belgium for a temporary self-employed activity.

2.1.2 Concept of discrimination

According to the case-law of the Court of Justice, there are two types of prohibited forms of discrimination: direct (overt) and indirect (covert).

Direct forms of discrimination are the most obvious. They refer to national regulations or practices which use explicitly the criterion of nationality to provide a right, a benefit or an advantage. In this type a situation, a Member State provides that only nationals will be entitled to such or such advantage. There are few examples of direct discrimination which have been ruled by the Court of

³⁸ (Case C-124/99, *Borawitz* [2000])

³⁹ See now Regulation...

Justice. One recent example can be drawn from a case involving the Belgian legislation. It shows that the condition of nationality, although used explicitly, can take various shapes. Indeed, the ECJ ruled that Article 3(1) of Regulation 1408/71 precludes denials of unemployment benefits to a national of a State other than Belgium on the ground that, on the date when the benefit claim was submitted, the person concerned had not completed a specified period of employment in Belgium, whereas there is no such requirement for nationals of that Member State⁴⁰.

When is a discrimination considered to be indirect? Conditions imposed by national law must be regarded as indirectly discriminatory *“where, although applicable irrespective of nationality, they affect essentially migrant workers or where the great majority of those affected are migrant workers, as well as conditions which are applicable without distinction but can more easily be satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of migrant workers”*⁴¹. One key difference between direct and indirect discrimination lies in the fact that, if the former ones cannot be justified, the latter ones can (in theory) be justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law. Examples drawn from the case-law of the ECJ show that the concept of indiscriminate takes various shapes: making the provision of a family benefit conditional upon the nationality of the mother’s young beneficiary; denying social security coverage for foreign language lecturers employed by universities; submitting a benefit to a prior condition of residence of a certain period on the territory which provides it, etc.

2.2 Waiving of residence clauses

2.2.1 Principle

According to Article 48 TFEU, the European Parliament and the Council must secure for employed and self-employed migrant workers and their dependants *“payment of benefits to persons resident in the territories of Member States”*. The explicit reference in the Treaty emphasizes the importance of the principle of *“waving of residence clauses”*.

Article 7 of Regulation 883/84 states that *“unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his family reside in a Member State other than that in which the institution responsible for providing benefits is situated”*.

The importance of the waving of residence clauses can be explained by its strong link with equality of treatment on one side and with free movement of self-employed persons on the other side. Indeed, exportation is a mere application of the principle of equality treatment between nationals and non-nationals: denying the right to export benefits would be an indirect form of discrimination since it would affect essentially (or the great majority) non-nationals; denying the exportation of benefits would also deter self-employed workers from being mobile within the EU, since if they knew that they would lose rights by crossing the border, they may avoid developing an international activity. As the ECJ states, the application of residence clauses must be set aside since their *“purpose is to guarantee the person concerned his right to social security benefits even after taking up residence in a different Member State and to promote the freedom of movement of workers, by insulating those concerned from the harmful consequences which might result when they transfer their residence from one Member State to another”*⁴².

⁴⁰ Case C-346/05, *Chateignier* [2006]

⁴¹ Case C-237/94, *O’Flynn* [1996]

⁴² Case C-282/91, *de Wit* [1993]

2.2.2 Implementation

The waiving of residence clauses concern cash benefits which cover those designed to compensate for a worker's loss of earnings. In practical terms, it refers to old age pensions, non occupational sickness benefits, occupational diseases and accident at work allowances, death grants, family benefits, unemployment benefits, survivors' benefits, invalidity benefits, maternity and paternity benefits, and pre-retirement benefits.

The wording of Article 7 of Regulation 883/84 indicates that the waiving of residence clauses must be interpreted broadly. It means that:

- benefits must not be reduced for the reason that they are provided abroad. For instance, fees should not be taken from the benefit even if their target is to compensate for banking costs of the transfer or for administrative extra-costs relating to the cross border operation;
- benefits must not be withdrawn or confiscated. This right means that a self-employed person who is granted a benefit in a Member State may not be deprived from it for the sole reason that he transfers his residence in another Member State. It also means that a self-employed person may not be prevented from acquiring a social security benefit merely because he does not reside in the territory of the State in which the institution responsible for payment is situated;
- benefits must not be suspended. Suspension would have barely the same effect as confiscation or withdrawal, except in case of suspension, the beneficiary would get the benefit back in case he would return to the paying State.

The right to export benefit applies to self-employed persons' family members. The family extension has concrete consequences, in particular when family members do not reside in the same Member State as the person from which they have access to social security rights. For instance, if a person exercises his self-employed activity in Member State A while the family resides in Member State B, they are entitled to family benefits paid by Member State A (competent Member State).

2.3 Maintenance of rights in the course of acquisition

2.3.1 Aggregation of periods

Article 48 TFEU provides that Member States must make arrangements to secure for employed and self-employed migrant workers and their dependants *"aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries"*.

This is a key principle since the amount of many social security benefits, in particular old age pensions and other "long term" benefits, depend on the periods of activity, insurance or affiliation accomplished. It is therefore of the utmost importance that periods completed in all Member States can be aggregated so that international career do not lead to losses of social security rights. The principle of aggregation is strongly connected to the core objective of free movement. As the Court of Justice stated, coordination regulations *"are intended to prevent the migrant worker, as a result of his migration from one Member State to another, from losing the benefit of his periods of employment and thus being placed in a worse position than that in which he would have been if he had completed his entire career in only one Member State. For that purpose they introduced a system of aggregation of all the periods of employment which may thus be taken into account for the*

*purpose of acquiring and retaining the right to benefits of the same kind in different Member States and for the purpose of calculating the amount of such benefits*⁴³.

The aim of the aggregation principle is not to secure the equalization of benefits between social security institutions but to enable a worker, who may lose the benefit of a period of contributions not long enough to give him the right to a pension, to avoid such a loss by aggregation.

According to Article 6 of Regulation 883/2004, *“the competent institution of a Member State whose legislation makes: – the acquisition, retention, duration or recovery of the right to benefits, – the coverage by legislation, or – the access to or the exemption from compulsory, optional continued or voluntary insurance, conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies”*. Only periods accomplished within the territory of the EU are subject to aggregation.

The practical implementation of the principle of aggregation by national institutions is complex, mainly because the comparison between benefits provided by national legislations is a tough exercise. Article 12 of implementing Regulation 987/2009 sets some procedural guidelines. It provides that the competent institution must contact the institutions of the Member States to whose legislation the person concerned has also been subject in order to determine all the periods completed under their legislation. It also sets rules aiming to avoid that the aggregation of periods create unjustified social security rights

2.3.2 Equal treatment of benefits, income, facts or events

In order to protect the *effet utile* of the free movement of employed and self-employed workers, it is necessary to make sure that facts occurred in on Member States may be assimilated to facts occurred in the Member State where a social security advantage is granted. For instance, the ECJ ruled on the ground of Article 45 TFEU that:

- A migrant worker who had to interrupt his employment with an undertaking in another Member State in order to fulfil his obligations for military service in the country of which he is a national, is entitled to have the period of his military service taken into account in the calculation of his seniority in that undertaking, to the extent to which the periods of military service in the country of employment are also taken into account for the benefit of national workers⁴⁴;
- where a public body of a Member State, in recruiting staff for posts, provides for account to be taken of candidates' previous employment in the public service, that body may not, in relation to EU nationals, make a distinction according to whether such employment was in the public service of that particular State or in the public service of another Member State⁴⁵.

The principle of assimilation was already applied under Regulation 1408/71 for the entitlement or the calculation of benefits through techniques such as the aggregation of periods of employment, affiliation, residence or insurance, and through the rule of equality of treatment. Also, specific rules of coordination of the old Regulation applied it, for instance for occupational diseases. But there was no specific provision dealing with the assimilation. This is now provided by Article 5 of Regulation 883/2004 which codifies the case-law of the Court of Justice by referring to two forms of assimilation, the assimilation, of facts and the assimilation, of benefits:

⁴³ Case 232/83, *Baccini* [1983]

⁴⁴ Case 15/69, *Ugliola* [1969]

⁴⁵ Case C-419/92, *Scholz* [1994]

- where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;
- where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.

The Court of justice provides examples for these two types of assimilation. Regarding the first one (assimilation of benefits), EU law precludes the application of legislation of a Member State which makes entitlement to an early old-age pension in the event of unemployment conditional upon fulfillment of the requirement that the person concerned has received, within a certain period prior to his application for the pension, unemployment insurance benefits from that Member State alone⁴⁶. Regarding the assimilation of facts, the ECJ ruled that where the legislation of a Member State provides for extension of the right to orphan's benefit beyond the age of 25 for recipients of benefits whose training has been interrupted by their military service, that State is required to assimilate military service in another Member State to military service under its own legislation⁴⁷.

Regulation 883/2004 provides for some specific exceptions in which the principle of assimilation does not apply. For instance, for the calculation of sickness cash benefits, Article 21(2) of Regulation 883/2004 states that *"the competent institution of a Member State whose legislation stipulates that the calculation of cash benefits shall be based on average income or on an average contribution basis shall determine such average income or average contribution basis exclusively by reference to the incomes confirmed as having been paid, or contribution bases applied, during the periods completed under the said legislation"*.

2.4 Applicable legislation: conflict rules

2.4.1 General rule and principles

The most important chapter we want to concentrate on, deals with the provisions on applicable legislation, ie the conflict rules that are applicable to self-employed persons. Which problems do we encounter when applying these rules?

The European Regulations have opted for the principle of the place of employment or the *lex loci laboris* as the criterion for being subject to the social security legislation. Regulation 883/2004 stipulates in article 11, §3 a that a member-State's legislation applies to anyone working in that State in salaried employment or otherwise. Thus the place of residence of the person concerned or the place where the employer's registered office is located are not the decisive factors. Taking account of the fact that social security rules, in contrast to, for example, labour law, are a matter of public order and the parties cannot agree between themselves which social security legislation a person will be subject to, everyone – whether employee or self-employed – will thus in general be subject to the legislation of the country of employment. This situations differs to the one we know under labour law. Under labour law, the principle of country of origin is applicable according to which the labour law conditions are in the first place determined by the state where the service provider is established notwithstanding the fact that the state where the activities are temporarily performed may apply certain of its labour conditions, as regulated by the posting Directive 96/71. Fully equal treatment as regards working conditions with nationals of the Member state of temporarily activities, must even be considered as a negation of the free movement of services. At the contrary, under social security

⁴⁶ Case C-373/02, *Ozturk* [2004]

⁴⁷ Case C-131/96, *Mora Romero* [1997]

law, it is primarily the working state that determines, and it is only with respect to the posting provisions, that an exception is foreseen and that the principle of the country of origin has priority. Opting for the country of employment will result in competition between workers in accordance with the principle of the rules applicable to the market where the work is being done. The purpose of the conflict rules is to place workers under the social security regulations of a single member-State, in order to prevent the concurrence of national regulations and the possible complications that would result.⁴⁸ The rules of conflict are neutral in this respect, in the sense that they pay no regard whatsoever to how great the allowances or how little the contributions are, and it is therefore not impossible that someone might be better off if another country's legislation were applicable. As a matter of fact, as a result of the internal market, it cannot be objected that companies or workers exercise their fundamental freedoms under the Treaty to settle down in another state where contributions are lower, on the ground that the exercise of those freedoms may confer an advantage on the companies or workers concerned with respect to companies who are based in the state where the services are provided. It is only when the posting conditions are fulfilled, that the person will remain subject to the legislation of the sending state. If not, it will again be the country of employment that will prevail.

However, it is not our intention here to dwell in this contribution on the question of whether and to what extent upholding the general working-country principle as the only conflict rule would be the most appropriate nowadays. The thinking on the principle of the *lex loci laboris* as the conflict rule is not new and proposals have regularly been put forward for alternative conflict rules.⁴⁹ Especially for self-employed people already in the past authors have defended the place of residence⁵⁰ or the place of business/registered office⁵¹ as a more appropriate general rule for self-employed than the place of work followed for the employees. One can only notice that with the introduction of Regulations 883/2004 and 987/2008 more or less the same general conflict rules were used. Whether these rules are indeed the most appropriate, is unclear. But the debate to our opinion should not be limited to the question of a possible exchange of one specific point of contact for another (e.g., *lex loci laboris* for *lex loci domicilii*) -in fact, it is not entirely certain whether the *lex loci laboris* is such a bad choice-but should rather focus on the fundamental principles of Regulation 883/2004, such as the fact that only one country's legislation can be applied. Or should a free choice be possible? Already elsewhere we have already launched the idea of examining the current conflict rules from a new perspective, an alternative framework within which a balance is sought between the three parties involved in the implementation of the Regulation: the workers, the employers and the social

⁴⁸Case C-276/81 *Luijten* [1986]; Case C-2/89 *Bestuur van de Sociale Verzekeringsbank v. M. G. J. Kits van Heijningen* [1990]; Case C-101/83 *Brusse* [1984]; Case C-202/97 *Fitzwilliam* [2000].

⁴⁹With respect to the new Regulation No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, *Oj. L.* 30 April 2004, 166, 1 (hereinafter: Regul. 883/2004), see also: P. Schoukens & D. Pieters, 'Regulation 883/2004: A new architecture of Co-ordination. New choice of law rules', EISS-conference '50 Jahre nach dem Anfang – neue Regeln über die Koordination sozialer Sicherheit Jahrestagung des Europäischen Instituts für Soziale Sicherheit', Berlin, 26-27 September 2008.

⁵⁰Marhold, Fr., "The free movement of the self-employed in relation to the free movement of the employed in the light of the European Strategy of Employment", in *The Free movement of the self-employed within the European union and the co-ordination of national social security systems*", European conference Athens 2000, Greek Ministry of labour and Social Security, Athens 2000, 33

⁵¹Schoukens, P, 'Self-employed people and the determination of the legislation applicable (Title 2, Regulation 1408/71)', in P. Schoukens (ed.), *Prospects of social security co-ordination* (Acco, Leuven, 1997), 157 .,

security institutions.⁵²

For the good order it is important to mention that according to the Regulation are considered as "active persons", persons receiving cash benefits, because of or as consequence of their activity" (eg. someone who receives unemployment benefits..). Basically this deals with persons who receive short-term benefits. At the contrary are assimilated to non-active persons (who are subject to the country of residence) people who receive long-term benefits like invalidity, old-age or survivors pensions or pensions in respect of accidents at work or occupational diseases or sickness benefits in cash covering treatment for an unlimited period (eg. retiree transferring his residence to a MS when claiming his old age pension or later).

2.4.2 Qualification as self-employed for the conflict rules

The social security Regulations know different conflict rules depending on whether a person is an employee or self-employed. In this respect it is important to find out which member-State determines whether a person is an employee or self-employed for the purposes of social security law? This search for the qualifying competence is an important one as it determines the selection of the conflict rule. It happens often that a particular activity has another qualification and a different status in the Member States. A well-known example is the managing director of a company who is seen according to Belgian law as a self-employed, contrary eg to the Netherlands where he is considered to be an employee. From the moment this person pursues his activities in another state with a different qualification, it is crucial to determine which state may decide if the person is an employee or a self-employed person. It is however a preliminary question which cannot be answered on the basis of the still to be appointed competent state. According to the ECJ, the terms *work in salaried employment* and *work other than in salaried employment* in Title II on applicable legislation must be construed in accordance with the definitions of Art. 1 of the Regulation. A person will be considered to be an employee or self-employed within the meaning of this article on the basis of the national social security system to which the person concerned is affiliated, and only the definitions of that system must be taken into consideration. These definitions may differ in this regard from those which are used in labour law. The term *employee* or *self-employed* will thus be determined on the basis of the social security legislation of each member-State where the work is performed.⁵³ But does this principle also applies in case of posting? Is it the sending state or the state where the activities are temporarily pursued? This question was raised in the Banks case where the Belgian authorities refused to accept the posting declarations issued by the United Kingdom and according to which artists (opera singers) who were qualified as self-employed in the UK were posted to Belgium. According to Belgian legislation however these persons were subject to the system applicable to employees. Belgium was of the opinion that it retained its qualifying competence. The Court did not had to answer at the end this question, however its attorney-general did. According to the attorney-general Colomer the qualification competence remains to the legislation where the person remains subject to, and the legislation of the Member State in which the temporary work is performed can

⁵² Within the scope of the treSS-project ('Training and Reporting on European Social Security', see also www.tress-network.org), a network established by the European Commission: Employment, Social Affairs and Equal Opportunities, that informs the European Commission particularly on the application of Regulations 1408/71 and 574/72 in the various member states of the European Union (project coordinated by the Ghent University, Prof. Dr. Yves Jorens), a think tank was established that, among other things, reflects on where the coordination rules need to be adapted, especially through new forms of short-term posting. At the end of 2008 the think tank's first report was published (Y. Jorens (ed), JP Lhernould (ed), JC Fillon, S. Roberts and B. Spiegel, 'Think Tank Report 2008, Towards a new framework for applicable legislation. New forms of mobility, coordination principles and rules of conflict, Training and Reporting on European Social Security', Project DG EMPL/E/3 - VC/2007/0188, Brussels, 2008), which can be found on the website mentioned above.

⁵³ Case C-221/95, *Hervein* [1998]; C-340/94, *De Jaeck* [1997].

have no bearing on the classification of the nature of the work⁵⁴. As posting introduces a fiction where the activities someone is performing in the host state are considered to take place in the sending state, the latter one therefore keeps the qualifying competence. It is up to the legislation of the country of origin to check which category – employee or self-employed – the cross-border person belongs to for his posting.⁵⁵

2.4.3 The legal framework of posting among self-employed persons

2.4.3.1 Basic principles

The posting provisions can be seen as the most important exception to the general conflict rule of the *lex loci laboris*. However, the large increase in the number of posting is causing many people to ask how far posting today constitutes another exception to the general principle of *lex loci laboris* or whether on the contrary it has become the normal rule? A flexible interpretation of the posting conditions in Regulation 883/2004, which are moreover difficult to check, may also perhaps offer an explanation for the growing success of these posting constructions. Is there an abuse of these provisions?

Is the posting provision a *lex specialis* or an exception to *lex loci laboris*?⁵⁶ Where exceptions to a basic rule should always be explained and applied somewhat restrictively, that does not apply when we are only dealing with a special allocation rule that, like *lex loci laboris*, has the fundamental objective of promoting the free movement of workers. Although it can by no means be denied that the objective of the posting provisions – just like the *lex loci laboris* rule, in fact – is also to promote the free movement of workers, some arguments nevertheless point in the direction of the fact that the posting provision is an exception to the general principle. At least the Court of Justice clearly stated that Art. 14, para. 1a of old Regulation 1408/72 is an exception to the rule of the working country.⁵⁷ On the other hand, the posting provision appears in Regulation 883/2004 under the sub-heading “Special Rules” and in particular in Art. 12. This is a difference from the provisions in Regulation 1408/71. Art. 14 of this previous Regulation expressly dealt with the “exceptions and particularities” with regard to the application of the general principle in Art. 13, para. 2a). Does this indicate that, under the new Regulation, it would no longer be a matter of an exception, but of a special, separate allocation rule?

The further question arises of to what extent posting is not only an exception, but must be obligatorily applied when the posting conditions have been fulfilled? Although posting will often be accompanied by the possession of a posting declaration, that possession is not a constituent requirement⁵⁸ and posting can consequently be applied for on the basis of purely factual circumstances, even if no posting declaration is forthcoming. It cannot be immediately deduced from this fact – that in principle posting must be applied for – that posting would only play a subsidiary role. In addition the fact that in the new Regulation 883/2004 the posting provision is a special rule, could support the conclusion that the posting provisions would be applied obligatorily, if the conditions are fulfilled. Perhaps support can also be found in the recent case *van Delft* from the Court of Justice. In this Case the Court declared with respect to sickness benefits for pensioners that “where the recipient of a pension due under the legislation of a Member State is in the objective

⁵⁴ Attorney-general Colomer in Case C-178/97, *Banks* [2000], I-2005, cons. 72.

⁵⁵ B. De Pauw and G. Van Limberghen, ‘Aanduiding van de toepasselijke socialezekerheidswetgeving’, (2004) *Tijdschrift voor sociaal recht*, 681-682.

⁵⁶ See P. Schoukens, ‘De Europese ontwikkelingen inzake detachering van werknemers en van zelfstandigen’ in Instituut voor Sociaal Recht (ed.), *Vreemdelingen en Sociale Zekerheid* (Meys & Breesch, Gent, 1996), 104.

⁵⁷ Case C-35/70, *Manpower* [1970] and Case C-202/97, *Fitzwilliam* [2000].

⁵⁸ See *infra* 2.4.3.8.

situation described in Articles 28 and 28a of Regulation No 1408/71, the conflict rule set out in those provisions applies to him, without his being able to waive it by declining to register in accordance with Article 29 of Regulation No 574/72 with the competent institution of his Member State of residence. Articles 28 and 28a of Regulation No 1408/71 are therefore mandatory for the insured persons who fall within their scope⁵⁹. So being in possession of a posting declaration is only an administrative formality and when a person does not hold an A-1 form, the posting provisions may be mandatory to him. Moreover, as it is said in the *van Delft* case (see §54), where coordination regulations gives insured persons within its scope a right of choice as to the legislation applicable, it does so expressly: this is not the case for posting.

2.4.3.2 Objectives

What are now the objectives of the posting rule? The objectives of posting are twofold and should be examined both from the viewpoint of the employee and from that of the employer. Consequently, posting is a means that should promote both the free movement of workers and the free movement of services. Already in the *Manpower* case, the Court pointed out that the aim of the exception of the posting provision was to eliminate possible impediments to the free movement of workers and to favour mutual economic penetration, avoiding administrative complications for workers, companies and social security institutions. The lack of such an exception provision would lead to disadvantageous consequences with regard to free movement for both the worker and the employer. More specifically, a company established in the territory of a member-State would be obliged to affiliate his employees time after time to the social security systems of other member-States, even though they were only working temporarily there. Workers would generally end up in a disadvantageous situation, given that short periods are mostly excluded with regard to receiving certain social benefits.⁶⁰ The purpose of this exception is thus clearly to make things simpler.

In subsequent judgements however, the Court makes it clear that the posting provision also has an objective in relation to the free movement of services. In fact, the purpose of the posting provision is “to promote the free movement of services for the benefit of undertakings which make use of them by sending workers to member-States other than that in which they are established. After all, the aim of the exception is to eliminate possible impediments to the free movement of workers and to encourage economic inter-penetration while avoiding administrative complications, particularly for workers and undertakings”. The posting provision hereby avoids the workers concerned having to be affiliated to the social security system of the member-State where they are sent to perform work of short duration, which would impede the free movement of services.⁶¹

2.4.3.3 From Regulation 1408/71 to Regulation 883/2004

Regulation 883/2004 also provides the possibility that a self-employed person could post himself (of course there is no question of an employer) to the territory of another member-State. A provision similar to that for employees is included here, even though there is a considerable difference.

“A person who undertakes work in a member-State other than in salaried employment and who undertakes work of a similar nature in another member-State remains subject to the legislation of the first-mentioned State, provided that the expected duration of that work does not exceed twenty-four months.”⁶²

The only fundamental change under the new Regulation compared with Regulation 1408/71, apart

⁵⁹ Case 345/09 (*Van Delft*)

⁶⁰ Case C-35/70, *Manpower* [1970]; Case C-202/97, *Fitzwilliam* [2000].

⁶¹ Case C-404/98, *Plum* [2000].

⁶² Art. 12, section 2 Regulation 883/2004.

from the extension of the duration to 24 months (with self-employed persons the posting may now last 24 months, just as for employees, for which no extension is possible (unless of course through an Art. 16 agreement), is that now it is required that the activities to be conducted in the country where work is to be done temporarily must be similar to those in the sending country.

In fact, some people believe that the posting of self-employed persons is a somewhat unnatural phenomenon, because it is obviously the self-employed person himself, in the absence of an employer, who decides to post himself. Because he is not an employer and there can therefore be no organic link with the latter, there would also be no real connection with the social security system of the sending country.⁶³ In the case of the self-employed, there is therefore no condition of an organic link with a sending company, nor is there any condition that posting cannot take place to replace another posted worker. It is quite logical that these provisions do not apply to a self-employed person. Of course, this does not mean subsequently that no link has to exist with the sending country. After all, it is also required of the person concerned that he/she has been undertaking work in the sending country other than in salaried employment. As also other conditions mentioned under the posting provisions for employed persons cannot apply to self-employed, like the fact that one cannot be sent to replace another person or that it is impossible that a posted worker would be made available by the user company to another company... it is seen sometimes as surprising that a conflict rule similar to the one for employees is foreseen for self-employed.

As it is often fairly easy to register as a self-employed person, it is easy to arouse suspicion. If moreover we are dealing with countries where the social security contributions are limited – which in the first instance is already the case with the self-employed anyway – there is usually a fear that the posting provisions for the self-employed will be abused. A typical example of this was the suspicion that existed with regard to self-employed persons on posting from the UK or the Republic of Ireland. In those countries unemployed workers can, for example, register as self-employed very easily by depositing a simple declaration at the post office. When those self-employed persons then go on to undertake activities in the country of temporary employment which in that country are traditionally considered as activities undertaken by an employee, many member-States appear not to accept the posting as a self-employed person. As mostly self-employed people are insured under a less worked out social security system as employed people, the fear for social dumping is very near especially if the person is considered employed person in the host state. In addition, for some member states, the fact that a self-employed worker is posted but performs activities as an employed person in the receiving state, is rather an indication that one exercises two jobs simultaneously for which another conflict rule is applicable.

Although application of the posting rule will in practice arise much less often than in the case of employees, this provision has nevertheless led to the usual problems.

2.4.3.4 Basic conditions

But which conditions have to be fulfilled before the posting provisions of self-employed may apply ? Art. 14, para. 3 of the Implementing Regulation 987/2009 specifies that the words “who intends to undertake work other than in salaried employment” refers to a person who normally undertakes substantial work in the member-State where he is established. In particular, that person must already have been doing his work some time before the date on which he wishes to invoke the above-mentioned provision and, during each period of temporary work in another member-State, must continue to fulfil the conditions for the execution of his work in the member-State where he is established so that he can continue with it after his return. This provision consequently takes over a

⁶³See P. Schoukens, ‘Self-employed people and the determination of the legislation applicable (Title 2, Regulation 1408/71)’, in P. Schoukens (ed.), *Prospects of social security co-ordination* (Acco, Leuven, 1997), 162.

number of legal considerations from the Banks judgement. That work in another member-State may comprise work in salaried employment and work other than in salaried employment. After all, according to the ECJ it can be seen from the terminology used in Art. 14-a, para. 1a) of Regulation 1408/71 – which deals with persons who “perform work” in the territory of another member-State – that this provision has general significance which relates without distinction to work in salaried employment or other than in salaried employment. Nor may we deduce from the fact that the title of Art. 14-a speaks about “persons who are self-employed” that the work described in paragraph 1a) should necessarily be work other than in salaried employment. After all, this title refers only to the activity that the person concerned “ordinarily” undertakes in the territory of one or more member-States and not to the service that he occasionally provides outside that member-State or those member-States. In fact, the Court also refers to the history of the origin of this provision whereby, when self-employed persons were included under the Regulation, the original proposal still spoke of “service-provision”, though this was ultimately replaced by the broader term “work”, which thus also comprises work in salaried employment.⁶⁴ However, because it is irrelevant whether the work is now undertaken by an employee or a self-employed person in the country of temporary employment, the classification of a particular employment under the social security legislation of the country of temporary employment as an employee consequently makes no sense at all. The mistrust, as mentioned above, of self-employed people who come to undertake work in the country of temporary employment which is traditionally done by employees is consequently unjustified.

2.4.3.5 Basic conditions: similar activity

What is new, is that Regulation 883/2004 does now require that the activities undertaken in the country where temporary work is to be done must be similar to those in the sending country. With “a similar activity” a new condition has been built into the Regulation. The provisions herewith differ from the posting provisions for employees where it is irrelevant that the activities the employee performs in the host state, differs from what he was normally performing in the sending state. The only element that really counts for employee is the organic link between the sending company and the posted employee.

However, this new condition for self-employed must not be wrongly understood. It is not the idea to counteract the described case law above, at the contrary. As Art. 14, para. 4 of the Implementing Regulation states, “the criterion for determining whether the work that a self-employed person goes to undertake in another member-State is similar in nature to the work normally undertaken other than in salaried employment, shall be the actual nature of the work and not the fact of whether that work is classified by that other member-State as work in salaried employment or other than in salaried employment.” Consequently, the classification of the work in the country where temporary activities are being undertaken plays no role. Whether the activities would lead to another qualification in the sending state is not answered but needs to be answered in a negative way. It seems to be logical that the activities the person is performing in the host state, must still be seen as self-employed activities under the sending state. If not it might perhaps lead to the conclusion that the person would switch from social security status as it will be difficult to be still insured under a system for self-employed when working as an employee.

The new wording ‘that the activities must be similar’ might well imply that it is of no importance whether they are undertaken in the capacity of a self-employed person or an employee, the question remains as to what extent the nature of the activities undertaken in the country of temporary

⁶⁴Case C-178/97, *Banks* [2000]. In the initial proposal from the European Commission aiming to insert the self-employed persons into the Regulations, the provision on posting spoke about a workers who carries out his professional activity in one state and who renders his services in another state.

employment has to be the same as or similar to those which are undertaken in the country of normal employment. To put it another way, does the nature of the activities actually undertaken in the country of normal employment have a role to play? This has already given rise to a great number of – sometimes enjoyable – discussions in the relationship between Poland and Germany, where questions are asked such as to what extent strawberry-picking abroad by a self-employed farmer is permitted, when that person normally grows other crops in his own country, mainly asparagus? Is it enough that the activities undertaken in both countries fall within the same broad sector of industry, e.g. agriculture? Neither the current Regulation, nor the European Court of Justice mention any definition of ‘similar activities’. However, the Administrative Guide does specify that it must be possible to confirm the work that the person concerned wishes to do beforehand – for example, by submitting certain contracts. It gives an example where there is no similar activity, eg if a carpenter goes to work as a casual labourer. Not much is specified about the nature [of the work]. The term “similar activities” does seem to indicate that an exactly identical activity cannot of course be required, but must be approached with a certain degree of flexibility. An overly-strict requirement and comparison of similar activities would result in a limitation of the free movement of services. In our opinion therefore, working within a fairly well demarcated sector of industry should suffice. For example, it should be possible for someone to raise cattle in one member-State and then go to pick strawberries in another member-State. However, a farmer who goes to work temporarily in a hotel in another member-State is not undertaking activities of a similar nature. On the other hand, this new condition might perhaps be helpful in making the distinction between posting and simultaneously employment. One could argue that in case a self-employed performs a completely other activity than his normal business, he is now performing new activities who has no connection anymore with his activities in the “sending state” which rather leads to a situation where one now performs activities in two states for which a separate conflict rule exists.

In the *Banks* case however, the German and Dutch governments had pointed out that if a self-employed person is also permitted to undertake work as an employee in the country of temporary employment, this could give rise to serious consequences. Thus, anyone could affiliate himself to the social security system for the self-employed in a member-State where the contributions are lower and indeed exclusively for the purpose of going to another member-State to work as an employee for a year, without having to pay the much higher contributions in the last-mentioned State. However, according to the Court this fear is unfounded, because it is required of the self-employed person that he would ordinarily undertake work other than in salaried employment in the country of origin prior to posting. So the reasoning here is similar to that pursued for employees. The absence of the condition that an organic link must exist does not mean that for the self-employed no specific link need to exist with the sending state. For a self-employed person too, it is required that he or she must have undertaken business activities of significance as a self-employed person in the sending country. According to Advocate-General Colomer in the *Banks* case, the purpose of this is to ensure that the self-employed person is going to do well-defined and specific work of which the content is established beforehand and of which the completion can be proven by means of the relevant contracts.⁶⁵

2.4.3.6 Basic conditions: pursue activities as self-employed in the sending state

The requirement is therefore that the person concerned has already been engaged in his line of work for a specific period of time on the occasion when he wishes to avail himself of posting. Notwithstanding the fact that such a condition could not be read literally in the provisions of the old

⁶⁵Case C-178/97, *Banks* [2000]. Since the implementing regulation of Regul. 883/2004 in art. 14, section 3, now explicitly prescribes that also a self-employed person must have already pursued his activity for some time before the date when he wishes to take advantage of the provisions of the posting article, this consideration is left out in the proposal for a new D. 181.

regulation 1408/71, the Court pointed out in the Banks case that , “such a person must already have been carrying out his activity for some time at the moment when he wishes to take advantage of the provision in question”.⁶⁶

The wording by the Court “for a certain time” remains however very vague and could vary between a day, a week, or a year? Also the new Implementing regulations gives us no further indication. It determines only that the words ‘who normally pursues an activity as a self-employed person’ shall refer to a person who habitually carries out substantial activities in the territory of the Member State in which he is established. In particular, that person must have already pursued his activity for some time before the date when he wishes to take advantage of the provisions of that Article and, during any period of temporary activity in another Member State, must continue to fulfill, in the Member State where he is established, the requirements for the pursuit of his activity in order to be able to pursue it on his return⁶⁷.

In this regard Decision A2 gives a period of two months by way of indication as a specific period of time. A case-by-case assessment would have to be made in the case of shorter periods, taking account of all the relevant factors.⁶⁸ The strict requirement of two months after all seems undesirable for all professions and in all circumstances. For example, a person who starts working as a freelance journalist or performer and whose first assignment was to report from abroad or perform with an orchestra abroad, should after all be able to avail himself of the posting provisions. Hence, it must be possible to apply the posting provisions too, even if two months of work have not yet elapsed. After all, setting an overly-strict period of time might lead to undesirable consequences here too. Unless a solution can be reached, possibly by concluding a contract under Art. 16 of Regulation 883/2004. Or is any period too much and an infringement against the free movement of services and would it be just enough to be registered and as such insured as self-employed?

The posting provisions are therefore also not applicable in a situation where jobless employees register themselves during their unemployment as self-employed with the social security authorities and subsequently – without working or having worked as such in the country of origin – going to undertake work other than in salaried employment in another member-State.⁶⁹

For the sake of comparability, for employees it is required that the employee is insured under the social security legislation of the member-State where the employer who posts him is established. The new Application Regulation 987/2009, specifies no period. In particular, the only condition laid down in Art. 14 of this Application Regulation is that the person concerned should already be subject to the legislation of the member-State where his employer is established, *immediately* (author's italics) before starting his work in salaried employment. In the new Decision no. A2 of the Administrative Commission this minimum period is now further determined and it is stated that such period must be at least one month in order to meet the requirement that a person be subject to the legislation of the country of origin immediately before starting work. Shorter periods should also be possible – perhaps to avoid problems with the European Court of Justice as every period seems to our opinion to be questionable – but they require a case-by-case evaluation of many factors.⁷⁰ Whereas under the previous practical guide under Regulation 1408/71 it was required that companies had to conduct their business in the sending country for a certain period of time –ie 4 months- before they can invoke the posting provisions, as proof that they are ordinarily performing their activities there, this condition of 4 month is no longer mentioned.

⁶⁶Case C-178/97, *Banks* [2000].

⁶⁷ Art. 14 (3) reg. 987/2009

⁶⁸ B. A2, cons. 2.

⁶⁹I. Van Der Steen, *Grensarbeid in sociale verzekeringswetten* (Kluwer, Deventer); loose-leaf commentary, part 2A, XII-22A.

⁷⁰ Item 1, Decision no A2.

The self-employed person must therefore be able to prove that he really normally works as a self-employed in the sending state. For that reason the self-employed must moreover continue to fulfil the conditions in the country of establishment during the period in which he is doing this work, to enable him to continue his work when he returns. He/she must maintain the requisite means and a specific infrastructure in his country of origin, which – however limited – is necessary for undertaking his work, so that he can continue that work normally when he returns. Thus, the intention is not that he ceases to work as a self-employed person. Pro-forma affiliations are consequently not possible. This condition could be seen as replacing the condition of the organic link between the sending employer and the employee which we know under the posting provisions for employees, and should help to avoid the abuse of the posting provisions by self-employed people. As the Court stated the posting provisions assumes that the person who is self-employed in the territory of a Member State carries out a work assignment (*un travail*) in the territory of another Member State, that is to say a defined task, the content and duration of which are determined in advance, and the genuineness of which must be capable of proof by production of the relevant contracts⁷¹.

Following the reasoning of the Court, Decision A2 now determines that the idea behind maintenance of an infrastructure is, for example, having office space available, the payment of taxes, the possession of a professional card and a VAT number and/or being registered with a Chamber of Commerce or a professional organisation.⁷² This is not an exhaustive list, and it will of course depend on the person's profession, whereby one cannot be too rigid. For some professions, very widely-differing criteria are possible or, in certain cases, even no criteria at all. We are thinking here of computer experts or translators.

After all, some of these criteria as the payment of taxes in the sending country, are a rather unfortunate criterion, because it is also possible that taxes will be paid in different member-States (in view of taxes on world incomes).

It is of course no sinecure to monitor this condition. Research we conducted earlier under Regulation 1408/71 confirms this. Luxemburg points out that it is often impossible to check whether a self-employed person is continuing his activities and furthermore to check whether the person concerned is paying social contributions⁷³ and taxes. In Bulgaria, the list in the Administrative Commission's Decision is monitored and also subsumed into their internal instructions. Nevertheless, this list is not considered to be exhaustive and other elements are also taken into consideration, depending on the case.⁷⁴ In this respect they are thinking of the question of whether certain contracts of employment are continued, if the self-employed person is an employer and the production facilities are considered important, if their existence is a requirement for the continuance of business activities in the sending state. In the Czech Republic, they look principally at the nature and scope of the activities in both member-States, the place of work in the sending state, the period of time during which the person concerned worked before being posted, as well as the period of time he works abroad and the money he receives (for example, does he have a contract with the employer in the sending country?). In the UK, such checks are not carried out, but the nature of the activities is investigated when the person concerned has put in an application. But as soon as the form is issued, no further check is actually made, except in very exceptional circumstances. Poland will always check whether the activity concerned has really been undertaken. The requirement of having an income in Poland is not immediately checked, because on the basis of internal law it is mainly important that

⁷¹Case C-178/97, *Banks* [2000].

⁷²Case C-178/97, *Banks* [2000].

⁷³In the previous Decision no 181, the payment of social security contributions was still mentioned as an indication. However, this is mixing up cause and effect. Fortunately, this criterion is left out now.

⁷⁴Consequently, Member States can autonomously decide to lay down other criteria if so desired.

people also desire to provide services, irrespective of the question of whether they also acquire an income. For example, the fact that people place advertisements in newspapers or wait for customers in certain agencies is considered as an expression of this desire. A person who desires to provide services but has no income, is in fact also insured in Poland as a matter of obligation.

2.4.3.7 Relation between posting provision and other conflict rules (simultaneous employment)

But in some cases it is not always easy to determine if the posting provisions are applicable, or perhaps another conflict rule. One problematic situation, for example, is the relation between posting on the one hand and the simultaneous execution of work in the territory of two member-States? This distinction is important because a different conflict rule is applicable in both situations. In the case of simultaneous employment, the sending country is not the competent country, but, on the basis of Art. 13, para. 1, the place of residence may be applicable (in the case of substantial activity in this country of residence). In the case of self-employed persons who post themselves repeatedly to the same member-State, it will of course be quite clear that the distinction between posting and the simultaneous execution of self-employed activities in different countries is paper-thin. One obligatory requirement for being able to post oneself is indeed that the person concerned must still undertake self-employed activities in the sending. Hence the question arises of whether the posting provisions are still applicable here. The new requirement in Regulation 883/2004 that a self-employed person must undertake similar activities in the country of temporary employment further increases the difficulty of making a distinction between posting and simultaneous employment.

In his conclusions in the case *Calle Grenzshop*, attorney-general Lenz indicated –however with respect to employees- that posting and simultaneously employment are mutually exclusive and that posting has an indication of a temporary character⁷⁵ and do not relate to activities that have no limitations in time. Attorney general Colomer indicated in his conclusions in the Banks case also that simultaneous employment and posting are mutually exclusive and that the first one implies that one is performing activities in two states at the same moment. Activities that are regularly and foreseeable would not fall under the posting provisions, regardless the period that one is exercising these activities. In case the working in several countries would be an integrated part of the business plan developed in advance, one could defend that the rules on simultaneous employment apply. In the Implementing regulation 987/2009 we can read that a person who ‘normally pursues an activity as a self-employed person in two or more Member States’ shall refer, in particular, to a person who simultaneously or in alternation pursues one or more separate self-employed activities, irrespective of the nature of those activities, in two or more Member States⁷⁶. Would this imply that a self-employed person who on a regular basis would have to travel abroad eg to visit clients and work there, will always fall under the rules of simultaneous employment as it would imply that it is the normal way how he/she performs his business? Or what to be said of a violin player who has concluded a service agreement with a big orchestra. When this orchestra is not on tour or during the holiday period, he goes to play for other orchestras around Europe. One could defend here that the conflict rule on simultaneous employment is applicable, as the person concerned still has an agreement with his orchestra and will continue to play for that orchestra. Indeed, in case the activity in the sending state would come to an end, and one goes to work shortly abroad, one might defend that the posting provisions are applicable as no two activities are performed at the same moment. This situation might however not always be very cristal clear. When can it be said that the activity came to an end? Exactly a self-employed person will hardly completely finish his activities in his “sending –home state” when he is shortly working abroad. It might be expected that he will further from his home place look for new clients, which would imply that he is still active in two states. Imagine the case of a painter who accepts a job in another state. He might have several orders for

⁷⁵ Case C-425/93 *Calle Grenzshop*

⁷⁶ Article 14 (6) Reg. 987/2009

painting in his home state. He however takes up a painting job abroad as one of his orders is postponed and he has some time free. Depending on the weather or other circumstances he returns from time to time to his home state to start up one of his orders. Can the posting provisions be applied? Another problematic element is that the free movement of services – and as the Court has indicated the purpose of the posting provision is “to promote the free movement of services for the benefit of undertakings which make use of them”⁷⁷ – as indicated by the Court of Justice, does not preclude a service-provider providing for an infrastructure in the host country (including an office or consulting rooms), if that infrastructure is necessary for providing the service in question.⁷⁸ In such cases one might defend that someone is perform simultaneously two activities and that the posting provisions do not apply.

According to Art. 14, para. 7 of Application Regulation 987/2009, the duration of the work in one or more member-States (whether it is permanent or *ad hoc* or temporary in nature) will be the deciding factor in determining the distinction between simultaneous employment and cases of posting. To this end, a general assessment will be made of all the relevant facts, including in particular – with regard to a person in salaried employment – the place of work specified in the contract of employment. Posting relates to a temporary, finite period. There is however ambiguity over which criteria have to be used. When are we still dealing with occasional work abroad or when, on the other hand, is it structured? And does this matter? In our opinion, a structured, regularly-occurring activity abroad seems rather to indicate simultaneous activities to which the posting provision is not applicable. This is certainly the case if it is clear beforehand that the activity will last longer than the 24 months allowed for posting. However also in case when the duration of employment does not exceed 24 months but the activity itself is not more than 24 months, the rules on simultaneous activities could be applicable. The time these two activities are performed is irrelevant.

As a last example, what about the situation of a combination between simultaneous employment and self-posting? A person normally works as a self-employed translator in Poland where he lives. In parallel he also works during one week per month as a touristic guide in Germany. He is now asked to go as guide for a short period to Belgium so he posts himself. Which legislation is now applicable to him? The starting point is that he works in parallel in two countries and so the conflict rules on simultaneous employment apply according to which he will be subject to the Polish legislation (the law of residence, where he has his substantial activity : Art. 13(2)(a) of Regulation 883/2004). Afterwards he posts himself to Belgium as a touristic Guide. As he is now insured in Poland, the Polish legislation remains applicable. The question could be asked if the posting provisions can apply to him? Indeed, for the posting conditions to apply, one has to perform similar activities in the sending state and the host state. Is it a problem that his main activity in Poland –the competent state as we have seen- is being a freelance translator and he goes to work as a self-posted touristic guide in Belgium? Both are not similar, as it is not in Poland that he normally works as touristic guide but in Germany. However we do not believe that this would exclude the posting provision since its under his activity a guide (one of the two activities he was in parallel pursuing) that he can claims to be self-posted. He is also working as a touristic guide and the rules on simultaneous employment install a fiction according to which both activities (translator and guide) are subject to the Polish legislation.

We therefore imagine as if these activities as Guide are also performed in Poland. The problem would be different if he pursues a temporary self-employed activity in Belgium, an activity which is not similar neither to the activity in Poland nor to the activity in Germany. Eg. he goes to work as a cook in Belgium. As there are no similar activities we would say that the conditions for the posting provisions do not apply, and as such he would also be subject to Belgian law through application of

⁷⁷Case C-404/98, *Plum* [2000].

⁷⁸Case C-55/94, *Gebhardt* [1995].

the *lex loci laboris* principle. As we have more than one applicable legislation, we should again apply the rules on simultaneous self-employment due to activities in more than one Member State.

These examples show how difficult it is to make a distinction between these two conflict rules.

However the decision on which conflict rule will be applicable is not completely without relevance. The conflict rule on simultaneously employment will indeed apply to situations where a person who carries on an economic activity in a Member State under whose social security legislation that activity is regarded as that of a self-employed person for the purposes of affiliation to the appropriate social security scheme, and who at the same time carries on an economic activity in another Member State under whose social security legislation that activity is regarded as that of an employed person for the purposes of affiliation to the appropriate social security scheme. Both Member states therefore remain –in the light of the *Hervein* case- competent to qualify the activities performed on their territory. Under the posting provisions however, as we have seen, the host state is not in a position to qualify the activities performed on its territory.

2.4.3.8 Administrative formalities and posting

A number of administrative formalities must be completed for the application of the posting provisions. If a person does his work in a member-State other than that authorised under Title 2 of the basic regulation, the employer/self-employed person will inform the authority of the member-State whose legislation remains applicable thereof, if possible in advance.⁷⁹ In this regard a posting declaration is always obtained on request. Thus, the appropriate authority of the member-State whose legislation applies under the posting provision of the basic regulation will, at the request of the person concerned, issue a declaration that its legislation is applicable and it will also mention until what date and under what conditions.⁸⁰ It has to be said that the posting form E101/A-1 has acquired general familiarity and has grown to become the most well-known form, mostly among migrants, although many of them were not fully acquainted with its contents. This new portable document has been given the name A1 and applies to a dozen situations, including secondment. This form thus confirms which social security legislation applies to the person concerned. It is widely known that possession of such a document is not absolutely required for the purposes of posting. A "portable document A1" is consequently not a constituent condition for posting. The absence of a form thus does not preclude the posting provisions from being applicable.

According to the ECJ, this partly and logically derives from the fact that a declaration of this sort can be issued with retroactive force. As the ECJ stated in the *Banks* case⁸¹, Art. 11-*bis* of Regulation 574/72 sets no deadline for issuing the posting certificate. By issuing an E101/A1 declaration, the authority of the country of origin only declares that, throughout the period during which the person concerned is working in the territory of another member-State, he remains subject to the legal system of the first-mentioned member-State. Consequently, a posting declaration has retroactive force. Very recently, the Court declared with respect to an E 121 form that as such a form is being purely declaratory, its submission to the competent institution of a Member State with a view to the registration in that State of the insured person concerned cannot therefore constitute a condition for entitlements to benefits to arise in that Member State⁸².

However, the reverse can also occur. A person has a posting declaration, but the member-State of

⁷⁹ Art. 15, §1 Regulation 987/2009.

⁸⁰ Art. 15, §1 Regulation 987/2009.

⁸¹ See also Case C-178/97, *Banks* [2000].

⁸² Case 345/09 (*Van Delft*)

temporary employment is of the opinion that this posting does not accord with the factual circumstances and, for example, that the posting conditions have not been fulfilled. The appropriate authority is, for example, of the opinion that the self-employed concerned does not usually conduct business activities of significance in the sending state or it was established, for example, that the person concerned was already employed in his own country and was consequently not insured in the sending state. Because the posting conditions are considered unfulfilled, there would have to be a reversion to the general rule of *lex loci laboris* and consequently the legislation of the country of temporary employment would have to apply. The big question that arises here is whether the authorities concerned in the country of temporary employment can simply set aside the posting declaration. Does this declaration have binding force? Fully in line with the jurisprudence of the European Court of Justice, Art. 5 of Application Regulation 987/2009 states that the documents issued by the authority of a member-State for the application of the basic regulation and application regulation to a person's situation and the certificates on the basis of which those documents are issued are binding for the authorities of the other member-States, so long as those documents or certificates have not been withdrawn or declared invalid by the member-State where they were issued. Thus, the ECJ had already stated that, on the grounds of the principle of loyal collaboration laid down in Art. 5 of the EC Treaty (now Art. 10 EC), the appropriate authority is obliged precisely to assess the facts that are relevant for the application of the rules concerning establishment of the applicable social security system and consequently to guarantee the accuracy of the information in the E101 (now A1) declaration.⁸³ The A1 declaration creates a suspicion that posted workers are duly affiliated to the social security system of the member-State in which the temporary employment agency is established, and is thus binding upon the appropriate authority of the member-State to which those workers are posted.⁸⁴ So long as the A-1 declaration has not been withdrawn or declared invalid, the appropriate authority of the member-State to which the workers have been posted must also take account of the fact that the workers are already affiliated to the social security system of the member-State where the company that employs them is established, so that they cannot be made subject to the social security system of the first-mentioned State.⁸⁵ This pronouncement and argumentation was fully confirmed by the Court in the Banks case with regard to the self-employed.⁸⁶ If there is doubt about the validity of the document or the accuracy of the facts on which the statements contained therein are based, the authority of the member-State that receives the document will ask the issuing authority for elucidation and, as the case may be, for withdrawal of the document. The issuing authority will reconsider the grounds for issuing the document and, if necessary, whether to withdraw it or not.⁸⁷ The institution of the hosting state is therefore expected to contact the institution in the sending state. Vice-versa however the Court does not seem to request the institution of the sending state to contact the posting state before delivering a posting declaration, although this might also be useful in certain circumstances (in particular eg for employees when controlling if there is still an organic link with the sending employer, condition that can hardly be controlled by the institution in the sending state).

This case law of the European Court of Justice was subsequently reflected in the Implementing regulation, whereby a dialogue and reconciliation procedure was instituted, which must enable the appropriate institutions of the member-States to come to an agreement within a reasonable period of time, not least in the interests of the people concerned. However, before passing the case on to the Administrative Commission, a dialogue and reconciliation procedure will be conducted as far as possible.⁸⁸ However this procedure will be suspended if the point under discussion has become the

⁸³ Case C-202/97, *Fitzwilliam* [2000].

⁸⁴ Case C-202/97, *Fitzwilliam* [2000].

⁸⁵ Case C-202/97, *Fitzwilliam* [2000].

⁸⁶ CJ C-178/97, *Banks* [2000].

⁸⁷ Art. 5, section 2 of the Implementing Regulation 987/2009.

⁸⁸ On this matter see also Decision A1 of The Administrative Commission on Social Security for Migrant Workers.

subject of a judicial or administrative appeal procedure under the national law of the member-State of the institution that issued the disputed document. The authority from whom further information is being sought will inform the requesting authority on the outcome of its investigation as soon as possible, but no later than three months after receiving the request. In exceptional circumstances, this period can be extended by a further period of three months if the authority concerned cannot complete its investigation because of the complexity of the case or because of the fact that, for example, the involvement of another institution is required. In very exceptional circumstances, the member-States can, for example, also agree to set aside these deadlines if an extension is justified and proportional in the light of the individual circumstances and this extension is also limited in time. If, during this first phase of the dialogue procedure, no agreement can be reached or the institution concerned has not been able to conduct the investigation within six months of the request, the appropriate institutions may decide to instigate a second phase of the dialogue or refer the case directly to the Administrative Commission. In the first case, a central contact person will be appointed within two weeks who will try to achieve an agreement within six weeks. However, if no agreement can be reached, the case can be brought before the Administrative Commission. The Administrative Commission will then try to find a solution acceptable to both sides within six months of the date when the case was submitted to it.⁸⁹ The case may also be sent, if necessary, to a reconciliation board, which can be set up within the Administrative Commission. This procedure is fully embedded in the general principle of close administrative cooperation, as described in Art. 76 of Regulation 883/2002 and also in the principle of good, loyal cooperation, laid down in Art. 10 of the EU Treaty, characterised by such things as exchange of information, based on principles of efficiency, active assistance and accessibility, whereby it is in the interests of both the appropriate authorities and the persons concerned that all the required information be provided as quickly as possible and the rights of those involved to be guaranteed.

The authorities concerned are consequently bound by posting declarations, so long as they have not been withdrawn. Although the posting declaration is drafted by the Administrative Commission- an institution which decisions have according to the ECJ no judicial value- the form it has however drafted does. It is well known that this strict adherence to a declared reality, above the factual situation, while ignoring practical difficulties has led to protest voices not at least from the social security institutions involved.

Often it happens that the posting state hardly investigates if the posting conditions have been really fulfilled or just finds it sufficient that the employer/self-employed person has paid social security contributions in the sending state. Or that the competent authorities are confronted with not or hardly filled in posting declarations or the filled in data do not reflect the factual situation. Or posting forms are only filled in the moment controls are undertaken by the inspection services in the hosting state. While in some circumstances it might be just a case of negligence, in other situations it will be exactly the objective to commit fraud. All these situations, together with the growing phenomenon of the use of several constructions through male-fide intermediaries and other forms of sub-contracting and outsourcing are at the origin of severe doubts if the posting provisions are correctly used. In addition, practice has shown that the proposed way of acting by the Court of Justice, is certainly not considered as the most appropriate and realistic one. The proposal by the Court that contact has to be sought with the institutions in the sending state, might indeed certainly fit in a constellation of administrative cooperation, however it counts fully on the goodwill of the institutions of the sending state to control and where required to revise the posting declarations. Indeed, no sanctions are foreseen in case the sending state would be reluctant to tackle the dispute. Furthermore, the proposal by the Court to bring the issue before the Administrative Commission when no agreement can be reached between both institutions, is neither a very realistic proposal.

⁸⁹ See also art. 5, section 4 of the Implementing Regulation 987/2009.

Until now, never one case has ever been brought before the Administrative Commission . Of course, the Administrative Commission is not a judicial authority and access to the courts must consequently always be guaranteed. The ECJ itself noted in the *Fitzwilliam and Banks* cases that member-States can go to the ECJ through a procedure under Art. 227 (now Art. 259 TFEU). This article clearly does not require that cases should first go through the Administrative Commission. Moreover, this commission consists of representatives of the member-States and consequently the first parties involved – workers and employers – are not involved at all in the whole process. Their rights are consequently not guaranteed in any way whatsoever. Perhaps at the end the only option would indeed be to bring the case before the Court of Justice, although this might be as well far from effective . Apart from the fact that the handling of such cases can take months and years and the situation under discussion might therefore have already come to an end , it is doubtful if Member States would just for a posting form start an infraction procedure against another Member State.

In a later case the ECJ had also stated that not only the social security institutions are bound thereby –which might to a certain extent be not very surprising as this institution is involved and has all interests to be able to make posted people subject to their legislation- but also the judicial authorities of those member-States, from which it might be expected that they are more objective. Also an independent body as the judicial authority in the hosting state, may not investigate the *de jure* situation. However the judicial authority of the host member-State is not authorised to check the validity of a posting declaration as regards the substantiation of the facts based on which such declaration has been issued. After all, if the appropriate national authority of a host member-State can have a posting declaration declared invalid by a judicial authority of that member-State, the system based on loyal cooperation between the appropriate authorities of the member-States might be endangered.⁹⁰ The only judicial authority that is in a position to judge the situation and even to instruct the competent social security institutions in the sending state to withdraw the posting declaration, is the judge in the sending state. It will be then up to the competent institution of the posting state to start a procedure before the Court in the sending state.

In literature it has already been defended that in case the posting declaration would have been delivered on the basis of fraudulent information, the institution in the hosting state would be in a position to ignore this form as according to the Court of Justice no application can be made of European law in case of abuse or fraud⁹¹. Already in the *Paletta* case on the payment of sickness cash benefits the Court declared that “Although the national courts may, therefore, take account on the basis of objective evidence of abuse or fraudulent conduct on the part of the worker concerned in order, where appropriate, to deny him the benefit of the provisions of Community law on which he seeks to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions”⁹². Community law cannot be relied on for abusive or fraudulent ends⁹³. *Fraus omnia corrumpit*. A posting declaration obtained on the basis of fraudulent given information could therefore not be seen as a valid document with all the consequences it produces under European law.

Of course for applying this argument enabling to ignore a posting declaration, it will be up to the competent institution in the hosting state to prove that the declaration was fraudulently obtained , ie with the specific objective to circumvent the application of the normal EU provisions (ie the *lex loci laboris*) or that falsified documents were delivered by the self-employed to the institution in the sending state (eg falsified document stating that one is registered with the Chamber of Commerce, or

⁹⁰ Case C-2/05, *Herbosch Kiere* [2006].

⁹¹ Verschueren, H., sociale zekerheid en detachering binnen de Europese Unie: de zaak *Herbosh Kiere*”, *BTSZ*, 2006, 442-444

⁹² Case C-45/90, *Paletta*

⁹³ Case *Kefalas* C-367/96

falsified invoices). This might perhaps not always be easy to prove and still the institution in the hosting state might have to rely on cooperation with institutions in the sending state. The same reasoning might be followed in case of not correctly filled in posting declarations. Quite often indeed institutions are confronted with hardly or wrongly filled in data. Important are however only these data which are required to allow inspection services to control if the posting conditions are fulfilled, (like eg sending state, period of posting, place of employment...). A situation that with the introduction of electronic exchange of data will less occur.

In such cases the institution in the hosting state might decide not to apply the posting declaration and as such make the person concerned subject to its social security legislation, this does not exclude that the person concerned might eg still further pay contributions in the sending state until the sending state has withdrawn the posting declaration.

2.4.4 Some other conflict rules

Apart from the posting provisions, Regulation 883/2004 provides for a number of other exceptions to the general principle of *lex loci laboris*, mainly in consequence of a special situation (e.g., working in different member-States). The objective of these exceptions are mainly to avoid administrative complications resulting from a too strict application of general rule that could limit free movement of persons/services. In the simplification and rationalisation process of the new Regulation 883/2004, a number of exceptions included in Regulation 1408/71 were modified. We can refer in this respect to the express confirmation that persons who are not employed are subject to the legislation of their country of residence; the fact that the earlier possibility under Appendix VII – that a person could still be subject in exceptional circumstances to two different sets of legislation when undertaking work as an employee and as a self-employed person depending on the countries involved– was rescinded and that, in addition, the special exception for international transport was rescinded, by which the persons concerned now come under the general rules for those who undertake work in two or more member-States.

In this part we want to highlight some of the other conflict rules that apply to self-employed people.

2.4.4.1 Activities as self-employed in two or more states

A person who normally pursues an activity as a self-employed person in two or more Member States' shall refer, in particular, to a person who simultaneously or in alternation pursues one or more separate self-employed activities, irrespective of the nature of those activities, in two or more Member States⁹⁴. Already above, we have indicated how difficult it might be to distinguish this situation from the posting situation.

When activities as self-employed are exercised in two or more states, the state of residence will be the competent state, in case substantial part of activities are also fulfilled in that state. The state of residence will only become applicable in case substantial activities are pursued in this state. Under the old regulation 1408/71 any activity was sufficient to switch from competent country which basically implied that although the conflict rules are of public order so that the persons concerned cannot decide on their own under which social security legislation they would be subject, "being inventive" with the actual circumstances made it more or less possible to influence the applicable legislation as every activity in the state of residence could lead to a switch from competent state. This is now avoided by requiring that substantial activities have to be performed in the state of residence.

⁹⁴ Article 14 (6) Reg. 987/2009.

For determining where someone performs his substantial activities, a quantitative criterion has been chosen, without this necessarily being the major part of the activities. Indicative criteria are, the turnover, working time, number of services rendered and/or income. These are indicative criteria and therefore apart from these criteria also other criteria can be taken into account. In the framework of an overall assessment, a share of less than 25 % in respect of these criteria shall be an indicator that a substantial part of the activities is not being pursued in the relevant Member State⁹⁵.

Let us imagine the following case. A person performs activities as bricklayer in Belgium, where he resides. During the weekend he works from time to time as self-employed in a restaurant in the Netherlands. Belgium will be the competent state as substantial activities are performed there.

In case no substantial activities are performed in the state of residence, the state where someone has its centre of interest will become applicable⁹⁶. This 'centre of interest' of the activities of a self-employed person shall be determined by taking account of all the aspects of that person's occupational activities, notably the place where the person's fixed and permanent place of business is located, the habitual nature or the duration of the activities pursued, the number of services rendered, and the intention of the person concerned as revealed by all the circumstances. The assumed future situation in the following 12 calendar months must be taken into account.

This differs from the previous rule under regulation 1408/71 where someone was subject to the legislation of the Member State in whose territory he pursued his main activity.

Let us imagine a person who performs activities as self-employed in Germany and Luxembourg. He has no permanent and fixed premises in these states. He lives in France. Most of the services are rendered in Germany, where he is for the moment investing and his plans are also to make Germany his centre of interest. In such a case, the competent state will be Germany.

It might be possible according to the circumstances that this state of the centre of interest would turn out to be at the end also the place of residence. Imagine the following situation. A self-employed person who resides in Belgium where he also has its registered office, pursues activities in the Benelux. In Belgium he spends 20% of his time, he renders 15% of his services there and his turnover originates for 22 % from Belgium. According to the above mentioned criteria he does not perform his substantial activities in Belgium. However, one could argue that Belgium is his centre of interest.

With respect to the rules on simultaneous employment for employees there is a strange difference. In the definition for employees we can read that normally pursues an activity as an employed person in two or more Member States' shall refer, in particular, to a person who ... (b) continuously pursues alternating activities, *with the exception of marginal activities*, in two or more Member States, irrespective of the frequency or regularity of the alternation (art. 14(5) of Regulation 987/2009). With the exception of marginal activities, implies that the idea is that when a person is only doing a very small job in another state –the amount of which is now discussed within the framework of the administrative Commission (marginal would be insignificant in time and economic returns, so everything less than 5%?)– this job would be neglected so that the person concerned would be considered to have only one job. The general rule of *lex loci laboris* would then apply. A similar exception we cannot read in the rules for self-employed people. So even when someone just takes up a very small activity as self-employed in another state, the rules on simultaneous employment will have to apply.

⁹⁵ Article 14, § 9 Reg. 987/2009.

⁹⁶ Article 13 (2) Reg. 883/2004.

2.4.4.2 Simultaneous employed and self-employed activities in 2 or more Member States

A person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject to the legislation of the Member State in which he pursues an activity as an employed person⁹⁷. Just as was the case under Regulation 1408/71 the activities as employee are considered to be more important in case of mixed activities. Under the previous regulation 1408/71 however, mostly as a reaction to this prevalence of the state of employed activity and as it was feared that this could result in unfair competition vis-à-vis those self-employed persons who did not work as an employee in the territory of another Member State, a new provisions article 14c sub b was created allowing Member States in some cases (as mentioned in Annex VII) to determine that each Member State has the competence over all the activities pursued on its territory, with the result that one could be subject to two systems⁹⁸.

This provision is luckily enough- not at least as it also was an exception to the general principle that only one state could be competent⁹⁹- abolished.

Reasons why preference is given to the state where employed activities are performed are however less clear and why eg one has not chosen to apply the connecting factor of eg the place of residence used when one is performing activities as employee or as self-employed in more than one state. For some the explanation might be found in the argument that it would be easier to collect contributions in the state where activities as employee are pursued, taking into account also that these contributions are most of the time more important than the contributions paid by self-employed¹⁰⁰. Let us imagine the following situation. A general manager lives in the Netherlands and works in Belgium (self-employed), in the UK (employed) and in the Netherlands (employed). The state where the person concerned performs activities as employee, is the competent state. As he pursues now in two countries activities as employed, we will have to determine on the basis of the general rules, which country has priority. This will be the country of residence, so the Netherlands. The competent state is therefore the Netherlands .

That the activities as employee are only subsidiary to the main activities as self-employed are not important. A self-employed person, who owns a shop in Member State A and who works as an employee during the weekends in Member State B, will be subject to the legislation of country B. Whereas the Regulation regulates the situation where someone performs several activities as employee together with one activity as self-employed and refers to the general principles when someone performs different activities as employee, no solution is provided however for when someone would perform different activities as self-employed with activities as an employee. It might be assumed to apply the general principles *mutatis mutandis*.

⁹⁷ Art. 13 (3) Regulation 883/2004.

⁹⁸ Cornelissen, R., "The self-employed and the coordination of social security in Europe", in Schoukens, P., Social protection of the self-employed in the European union, Deventer, Kluwer, 1994, 51

⁹⁹ The Court of Justice found this however not contrary to the general principles of the EU-Treaty (see C-393/99 en C-394/99, Hervein II).

¹⁰⁰ Kavelaars, P., Toewijzingsregels in het Europees sociaalverzekeringsrecht, Kluwer, Deventer, 1992, 431.

III. THE STATUS AS SELF-EMPLOYED PERSON: ATTRACTION FOR SOCIAL DUMPING?

1. An increase in the number of self-employed

The last years we can notice in certain countries and especially in certain sectors –like eg. the construction sector- an increase in the number of self-employed people. Certainly the number of foreign self-employed people raised considerably. Most often however doubts exist about the genuine self-employed status of these people and it is more and more believed that we are confronted with a growing number of bogus self-employed people.

It can indeed not be ignored that the changing labour market and the growth of practices such as outsourcing and contracting out, has meant that employers are increasingly interested in hiring workers with a non-traditional labour relationship.

As one of the main reasons for this increase is often mentioned the free movement of services. Indeed, contrary to the free movement of workers where transitory provisions were enacted, the free movement of services was applicable from the first day of accession to the new Member States and has further increased this recourse to these new forms of labour, sometimes associated with instances of social dumping. The application of the free movement of services has led to a situation where more and more people become or act as “self-employed” not only to circumvent access restrictions to foreign labour markets, but also to avoid the implementation of minimum social standards and conditions in the host country. In these situations, the self-employed of today are no longer individual entrepreneurs, highly qualified workers, but rather a vulnerable part of the workforces, devoid of all necessary social protection and exploited by employers, who rely on their services primarily to reduce the social costs and to avoid the application of many legal social provisions¹⁰¹. A trend can thus be noticed, where more and more people rely on workers with “self-employed” status and subordinate employment decreases. An employer who resorts to self-employed workers instead of salaried employees can sometimes avoid paying considerable social and tax contributions and circumvent other labour obligations.

A recent study on the phenomenon of possible bogus-self-employment in the construction sector in the Netherlands, has eg. shown that the number of self-employed without personnel that are active in the Dutch construction sector has increased enormously the last years¹⁰². In two years time there is a 31% growth, from 52.600 to 69.050 people and a yearly growth of 15% is seen as a careful estimation. Out of 90.000 construction companies, only 53.000 are companies with at least one employee (including the entrepreneur himself). This also explains why there are so many self-employed without personnel. The most frequent form for self-employed without personnel (96%!), is indeed the one-man business. The one-man business has the advantage that there are hardly any

¹⁰¹ JORENS, Y., "Self-employment and bogus self-employment in the European construction industry A comparative study of 11 Member States", report drafted by order of the European Social partners of the construction industry (EFBWW and FIEC), with the financial support of the DG for Employment and Social Affairs of the European Commission, Brussels, 2008, 36 p
<http://www.efbww.org/default.asp?Issue=Self-employment%20and%20Bogus%20Self-employment&Language=EN>

¹⁰² JORENS, Y., and KLOSSE, S.,(with collaboration of KOOIJMAN, C.), "Self-employment and bogus self-employment in the construction industry in the Netherlands", National Expert report in het framework of Research on self-employment and bogus self-employment in the construction industry, EFBWW-FIEC, Brussels, 18 p.
<http://www.efbww.org/default.asp?Issue=Self-employment%20and%20Bogus%20Self-employment&Language=EN>

costs. The annual invoices do not have to be approved by an accountant, and there is also no impediment against hiring temporary staff. The income of the entrepreneur is the result of the one-man business and consequently, only income tax has to be paid.

All these figures feed worries for a growing misuse of the free movement of services and establishment. Another example can be given here. It is eg not the first time that social inspection services control a construction site where they found workers who were posted by their employer-subcontracting firm. After this control the foreign company disappeared. Only a few weeks later the same foreign persons were found back on another construction site but this time as posted-self-employed person.

Notwithstanding all the good reasons to work as a self-employed person, as the desire to work according to one's own perspectives and expectations, fiscal advantages, etc. for employers it offers possibilities to make use of the production factors in a more efficient way, as well it offers more flexibility and lower salary costs. It is for sure that hiring a self-employed person costs less to the company than hiring an employee. Calculations have shown eg. that in the UK, engagers of self-employed pay no national insurance, whereas the engagers of direct employees pay 12 %. It has been estimated however that the true cost differential ranges between 35 and 50 %¹⁰³. Traditionally, employed persons enjoy more rights than the self-employed. The labour rights concern rules regarding wage and salary protection (working time, minimum remunerations, manner and place of payment), terms and conditions of employment, the working schedule (limits on working hours, rest periods, Sunday rest, breaks), rules on social records, supplementary pensions, interim work, additional social advantages, the continuation of payment of remuneration by the employer during sick leave, the protection against dismissal, annual and special leave.

An element that contributes to this tendency is that a lot of national legislations make it rather easy to register as self-employed person and so to join the social insurance statute for self-employed. Many national legislations hardly know any formalities to be fulfilled to set up as a self-employed worker and thus it is easy to start to perform self-employed activities or do not really check the conditions. There are not really any specific, preliminary conditions that have to be fulfilled. What is requested is often that one has reached a certain age, that one has fulfilled all fiscal obligations and has no police record and just a confirmation of entry into the Chamber of Commerce/register of enterprises. Sometimes qualifications standards for some professions have been developed and a professional ability certificate is requested attesting the professional experiences (educational diplomas and certificates, professional competence certificates etc.) But often the declaration is purely declarative and the administrative authorities do not check on the professional qualifications of the person registering (eg in Poland). A special situation can be found back in the Netherlands with the introduction of the so-called Declaration of employment relationship (VAR). This declaration is a statement on the status as self-employed from a fiscal point of view delivered on request by the Tax Service. The declaration offers the possibility to determine if the taxpayer enjoys advantages as result of an employment relationship(s); out of the profits of his business activities; as a remuneration, or as a consequence of other activities. A decisional framework was set up in 2005 on the nature of the employment relationship that strengthens the legal effect of this declaration. The delivery of a declaration of employment relationship (VAR) is considered by the Tax Office as well

¹⁰³ JORENS, Y., "Self-employment and bogus self-employment in the European construction industry A comparative study of 11 Member States", report drafted by order of the European Social partners of the construction industry (EFBWW and FIEC), with the financial support of the DG for Employment and Social Affairs of the European Commission, Brussels, 2008, 36 p

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as by the competent social security institution for the execution of the work insurances (UWV) as a confirmation that activities are performed as an independent exercising his business or profession.

But this certain attractiveness does not only finds its origin in the national legislation, but can also follow from European law, or better said the non-application of European rules. Indeed, one of the basic European instruments enacted to regulate the labour conditions from workers who perform temporarily their activities in another Member-State, the so called Posting Directive 96/71 only applies to companies that post workers to another member-State within the framework of transnational measures. Self-employed people who go to work temporarily in another member-State therefore escape the obligations regarding working conditions and pay conditions, as specified by the Directive and the national implementing law.

2. Self-employment in a triangle relation

Furthermore, it can be noticed in several countries that more and more constructions have been set up with the involvement of several companies that should allow to hide the real status of the person concerned and should try to profit as much as possible from the advantages of the status of self-employed. A growing number of “male fide” intermediaries, employment agencies which to a large extent are involved in arranging work assignments for the self-employed.

A Dutch report shows that approx. half of the most important companies in the construction sector hire employees via employment agencies (bona fide or male fide), another 10 % via subcontractors and 3 % as posted workers.¹⁰⁴ Working with male-fide intermediaries has led to different forms of fraud. Agencies located in other European countries have organised vast fraudulent systems using both self-employed workers and workers posted temporarily abroad.

A typical example is the set-up of companies, including one-man business companies, where under the semblance of independent work, in reality employment contracts are involved and that should allow to escape certain social conditions.

A growing phenomenon is the set up of individual companies or corporate structures. One of the most typical examples that often appears in Belgium are eg. companies established in Belgium, usually private limited companies [BVBA/Ltd] set up by a Belgian lead person, with, for example, Polish shareholders with one share who post themselves to Belgium as working partners and have a posting form issued by the Polish social security authorities. The following example indicates how lucrative such a construction can be. A Belgian sets up a company in Belgium. He looks for someone who speaks Polish and then goes to Poland to contact people to offer them to come to in Belgium. Customers are charged €24 for work done by the Polish people. They work 40 hours a week. That amounts to €4156 per month of income per Polish worker (40×4.33 (for monthly wage) = 173 hours \times €24 = €4156 of income per Polish worker), The Polish workers become partners of the company. They receive 1200 € 1per months, plus an apartment for lodging for the price of 200 € per month. The Belgian pivotal figure pays their social contributions as self-employed at about €400 per quarter. The “partners” cost the Belgian €1800 (1200+200+400) per month, but bring in €2,356 per worker

¹⁰⁴ JORENS, Y., and KLOSSE, S.,(with collaboration of KOOIJMAN, C.), "Self-employment and bogus self-employment in the construction industry in the Netherlands", National Expert report in het framework of Research on self-employment and bogus self-employment in the construction industry, EFBWW-FIEC, Brussels, 18 p.

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(Revenues €4156 – Costs €1800 = €2356 profit per worker). If he works with 15 Polish partners, the construction would result in €35,340 per month ($15 \times 2,356 = € 35,340$).

Another form is a construction whereby work is done with intermediary invoicing firms (trust companies or cash companies) to blur the tracks to the actual employer. Here we are talking about Belgian companies that send invoices to a Belgian client via an intermediary invoicing firm, whereby the work itself is done by other Belgian companies, once again with exclusively Polish working partners. Checks revealed that the client pays about €19 per hour to the intermediary invoicing firm and the latter pays €8 per hour to the Polish firm. So the Polish partners earn about €5 per hour, after deductions for Belgian social security contributions. The national social security authority for employed persons cannot take action against these intermediary invoicing companies because there are no employees there.

A similar example can be found back the last years in Germany. There are increasing examples of cases in which a “head” and numerous unskilled or poorly skilled workers of new member states present themselves as a GbR (Gesellschaft bürgerlichen Rechts) or similar foreign company constellation without the necessary precondition for the formation of such a company being met. In such cases it is to be checked whether the employees do actually act in a partner status or whether there exists a de facto employer employee relationship between the person concerned and the German or foreign “head” of company. With the registration of trade of a GbR there is no check whether this constellation is a real GbR with partners or a company with employees.

Also the set-up of one-person business companies is revealing. For eg. The Dutch system of Self-employed Persons without personnel (ZZP-system) is assumed to be a possible source of bogus-self-employment. ZZPs share several of the following characteristics: does not employ employees; works for one or more costumers, one of which is the most important; performs work that usually is done on the basis of an employment agreement; the activity is restricted to add skills and knowledge to its own field; only carries out commissioned work; does not or hardly canvass for customers; does not or hardly invest in buildings, capital goods etc.; scarcely owns or does not own any company premises, which may be or may not be the workplace; is responsible for its own activities; is paid per commission and is dependent of the external economic infrastructure.

But also quiet often one-person business companies are set-up in order to perform activities on the territory of another Member state and where a self-employed comes to work with his posting form A-1.

An additional argument for setting up a company structure is eg. that in certain countries- like Belgium- national legislation knows an undeniable presumption in the social security legislation that partners of commercial companies are self-employed. The status of self-employed as manager or director of a company is consequently used as means of escaping the obligations deriving from Directive 96/71. Of course, this reasoning does not hold water, in the sense that the person’s status under social security law does not determine his classification under labour law.

3. Reclassification of self-employed: demarcation between employees and self-employed

The only option that can be hoped for by inspection services in the country concerned when doubts arise around the status of self-employed people who settle down in the country or who perform temporarily activities, is the possibility to reclassify the social status of these self-employed person and that eg. in case of free movement of services the posting is not allowed.

In this respect labour law and social security law differ from each other. Indeed, also according to the Posting Directive, the term ‘employee’ will be interpreted by the law of the member-State where the employee is being posted¹⁰⁵ Since the host country is given the authority to interpret the term ‘employee’, it is therefore up to the host country to determine the classification of the posting of the person concerned under its labour legislation and this on an unilaterally basis. The authorised bodies of the host country are permitted to reclassify the legal qualification assigned to the person involved in the country of origin. This means that the host country may apply its national legislation and take a unilateral decision with regard to the qualification to be assigned to the legal situation concerned. However, such an option does not exist under Regulation 883/2004. As we have noticed before, as a result of the jurisprudence of the European Court of Justice, the authorities concerned in the host country will have to accept with a virtually irrefutable presumption the qualification assigned by the country of origin, upon presentation by the country of origin of a form A-1 on the applicable legislation. A unilateral reclassification is impossible. The authorities of the host country concerned will, if required, have to contact the country of origin to ask the latter to review the qualification. However, applying their own legislation to the status assigned abroad is not possible.

3.1. Self-employed or bogus-self-employed?

The reclassification is nothing particular with respect to foreign self-employed persons as the same problematic also applies within a national context. How can bogus-self-employment be avoided? This depends basically from the answer to the question of how to correctly assess and legally classify employment using the tools provided by legislation or prescribed by case law. How does the judge expose bogus-self-employment and classify it as employment? Without going into detail, as this is more a labour law than a social security issue, this problematic also deals with the preliminary question to what extent parties may qualify their own relationship and whether the judge may reconsider this qualification and if so what limitations to this action are there? Although generally speaking parties are completely free to arrange their contractual relations within the limitations imposed by law in the end the question is whether the intention of the parties or the factual situation is predominant in defining the labour relation. This situation is differently arranged in several states. In Belgium, the situation lies somewhere in the middle as the will of the parties is decisive so long as services rendered correspond to the purpose of the contract. In the Netherlands however the factual situation seems to prevail although the national courts interpret it slightly differently. For the Supreme Court the factual situation prevails, but the Court will only look at the factual performance when uncertainty exists as to whom a contract is drawn up between, and not when the labour contract is clear from the outset. The Courts of Appeal however pay more attention to the factual situation of the labour agreement than to the agreements between or intentions of the parties.

In Poland the will of both parties is decisive and the Court must respect it. This implies that if both parties wish to be involved in a self-employment relationship, then the case presented by the National Labour Inspectorate representative will be dismissed. In France on the contrary, the recognition of a direct employment situation depends neither “on the will expressed by both parties” nor on “the name given to the agreement” but only on “the factual conditions under which the service is supplied by the worker”. The same conclusion can be drawn for Germany where the way the relationship in a contract is concluded has no bearing on how the distinction is made. It is rather a question of the exact nature of work and how it is actually carried out.

¹⁰⁵ Art. 2, section 2.

Further decisive is than which elements and criteria are considered as conclusive in establishing the nature of an employment situation?

In several countries case law has created tests to find a distinction between self-employed and employed persons where most often elements like subordination, independence regarding working time and work schedule, responsibility and the risks assumed by the worker, the use of one's own tools, and the fact that one works for several clients are seen as relevant. We can just notice here that for Belgium after years of discussion before the Courts, the legislator defined four specific criteria to be used to distinguish the self-employed status and the employment status: the will of the parties as expressed in the agreement as long as it corresponds to the reality, the freedom of organisation of the working time and work, and hierarchic control. The strong reliance on the will of the parties, lead to situations that it becomes almost impossible to requalify the status of the person concerned.

3.2 *Some practical examples*

Let us give her a few national examples that show the situations but also the difficulties countries are confronted with.

A first example comes from the Netherlands. The Court of First Instance judged that we had to deal with a case of bogus-self employment with Hungarian reed-thatchers. A posting company was responsible for the management of the tasks and the tenders for the Hungarian reed-thatchers, the administration, the office facilities and the accommodation. The Hungarians were considered to be unable to obtain assignments on their own in the Netherlands. They did not made publicity. The Court refers to the labour inspection report where it is mentioned that the posting company decided which project was assigned to which reed-thatchers; that the company was responsible for the performances of the reed-thatchers and that it had also the competence to replace them. Also the price paid to carry out the work was determined in agreement with the posting company as well the invoicing was done neither by the workers themselves, nor by their accountants on their behalf, but by the posting company. According to the Court, the fact that there did not exist a relationship of subordination between the three reed-thatchers and the plaintiff does not imply that the plaintiff cannot be considered an employer. On Appeal however the Council of State did not follow the Court of First Instance and judged that the court erroneously decided that the foreigners did not perform the work as self-employed in the framework of a cross-border provision of services. The Council came to that decision by looking at the following elements: the foreigners were not paid during the days when they were ill, they had bought the reed themselves and they had also worked using their own equipment and protection. Moreover, the minister did not contest the following facts: the foreigners have their main residence in Hungary, they accomplish tasks in other member countries of the European Union, tasks that they did not receive via appellant and they have many principals. Important was that since the 1st of July 20008, the foreigners have in each of the cases worked in the Netherlands for another principal. That the foreigners were not aware of the payment regulations is of no major importance, as it now appears that they have determined the terms of the agreements together with the interested partners. Moreover, activities as self-employed do not exclude collaboration between the three self-employed. The conclusions was made that the overall circumstances show that the foreigners were dependent from the mediation of the office, but not that the activities were performed under a relation of subordination.

Another example comes from Belgium and shows how the Courts tries to see through the shareholdership and classifies the persons concerned as being in a relationship of subordination.

From the point of view of corporate law, such constructions are giving rise to some concern. What seems to be important is the improper use of the corporate structure through the absence of a so-called *affectio societatis* between the partners. After all, being a partner means that you share the risks of a company and, in other words, you invest money in it and bear any losses the company might make. Indeed, partners make a contribution in exchange for shares. As a rule, that contribution is usually in the form of cash or other assets amenable to economic valuation, but excluding the obligation to undertake work in the future. Because those persons do not share in the entrepreneurial risk, this can indicate that they are not running a business together. The Court of First Instance decided eg. that the *affectio societatis* was manifestly absent with seven Bulgarian directors of a company in the meat industry, because the purpose of the Bulgarians was clearly not to set up a company and make profits with it. It was obvious that they only wanted to work officially in Belgium for a good wage, preferably fixed. The foundation of a company was only seen as a means to this end and was by no means the objective per se. Thus the manager of the company gave his seven Bulgarian partner-directors assignments where they had to go and work; he paid a fixed hourly wage at a fixed time to those involved; the manager gave them a raise; he determined how much the customers would be charged, as well as the distribution of profits, and he also checked the working hours of the “directors” concerned”.¹⁰⁶ The employment of the Bulgarians concerned as self-employed people was therefore merely a construct.

However it must be repeated that this requalification of the status by the host state, can by no way imply that the applicable legislation on social security law will change. As a consequence the re-classification of the person’s status, in the presence of a posting form issued by the country of origin, can never result in the application of the social security legislation of the host state, but does leave open the possibility to apply the labour-law consequences of that re-classification (= application of employment terms and conditions of host state). It is not because from a labour law perspective a link of subordination exists between a foreign employee and a user company in the host state that also from a social security law perspective a new link of subordination exists and that as a result from that the posting provisions can no longer apply. National law cannot interfere with European law that has priority. From a social security perspective there is indeed no posting fraud at stake. This would only be the case if the person involved could not be a self-employed person according to the legislation of the sending country. But it is up to the sending country to state this. So someone who might be seen as self-employed for social security reasons, might be considered as employee from a labour law perspective (see eg. Banks-case where the British opera-singer had a posting certificate as self-employed but would be seen as an employee under Belgian law) .

¹⁰⁶ Criminal Court of First Instance Ghent 18 April 2007, unpublished. See also District Court Ghent, 21 November 2007, unpublished.